24 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Plaintiff.
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Respondent.

Injunction.

Territory of Hawaii to Honolulu Rapid Transit and Land Company, a Corporation, Greeting:

Writ of Injunction.

The within cause having come on regularly for hearing before me upon Bill of Complaint, Answer and Replication, E. C. Peters, Esq., appearing as of counsel for complainant and D. L. Withington, Esq., appearing as solicitor for respondent; and evidence both oral and documentary having been adduced by the respective parties, and the cause submitted;

And it appearing that the said respondent on the 7th day of September, A. D. 1907, and since maintained and operated, and now maintains and operates, each and every day, between the hours of 5:45 a. m. and 11:42 p. m., over and along Liliha street, within the District of Honolulu, County of Oahu, cars for the carriage of passengers, both ways, with the exception in respect to the first car up or Northerly, and the last car down or Southerly when only one way, at intervals of not more than ten minutes;

25 And it also appearing that the public convenience requires the number of cars now and so operated by the said respondent over and along the said Liliha street, during the said times, and that a less number of cars for the carriage of passengers over and along said Liliha street is insufficient to meet the requirements of public convenience:

It is hereby ordered, adjudged and decreed That the respondent, the Honolulu Rapid Transit and Land Company, be, and it is hereby perpetually enjoined from operating over and along Liliha street within the District of Honolulu, County of Oahu, cars for the carriage of passengers insufficient in number to meet the public convenience and from reducing the number of cars for the carriage of passengers from the number now operated and maintained by it over and along said Liliha street daily, between the hours of 5:45 a. m. and 11:42 p. m., to wit: one car every ten minutes, both ways, with the exception in respect to the first car up or Northerly and the last car down or Southerly when only one way.

Done at Chambers this 24th day of October, A. D. 1907.

(Sig.) J. T. DE BOLT.
First Judge, Circuit Court, First Judicial —, Territory of Hawaii.

To the High Sheriff of the Territory of Hawaii or his Deputy, the Sheriff of the County of Oahu or his Deputy:

You are hereby directed and commanded to forthwith serve the foregoing writ of injunction upon the Honolulu Rapid Transit and Land Company, a corporation, the respondent above named.

Hereof fail not, and of your doings hereon make due return to this Court.

(Sig.) J. T. DE BOLT,
First Judge, Circuit Court, First Judicial Circuit, Territory of Hawaii.

26 Served the within Writ of Injunction on the Honolulu Rapid Transit and Land Co. a corporation, through C. H. Atherton its Treasurer, at Honolulu, Island and County of Oahu, Territory of Oahu, this 26th day of October, 1907, by delivering to him a true and certified copy hereof, and at same time showing the original.

Dated, October 26, 1907.

GEO. C. SEA,
Deputy High Sheriff, Ter. of Haw.

Endorsed: Circuit Court 1st Circuit. Equity. 1588 Reg. 1/328 Territory of Hawaii by Charles R. Hemenway Attorney General etc. *vs.* Honolulu Rapid Transit & Land Co. Writ of Injunction. Filed October 26th, 1907, at 10:2 A. M. Job Batchelor, Clerk. Charles R. Hemenway, Atty. Gen. and E. C. Peters of Counsel for Complainant.

27 In the Circuit Court of the First Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Plaintiff,
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Respondent.

Injunction.

Notice of Appeal and Appeal.

You will please take notice that the defendant in the above entitled cause, the Honolulu Rapid Transit and Land Company, a corporation, hereby appeals to the Supreme Court of the Territory of Hawaii from the decree, writ of injunction and order entered in the above entitled cause in this Honorable Court on the 24th day of October, A. D. 1907, in favor of the plaintiff in said suit and against the defendant, and from the whole thereof.

Dated, Honolulu, this 26th day of October, A. D. 1907.

(Sig.) CASTLE & WITHINGTON,
Attorneys for Defendant the Honolulu Rapid Transit and Land Company, a Corporation.

Endorsed: E. No. 1588. Reg. 1/238. Circuit Court First Circuit Territory of Hawaii. At Chambers. Territory of Hawaii *vs.* Hon. Rapid Transit & Land Co., a corporation. Notice of Appeal. Filed October 26, 1907, at 12:2 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington attorneys for Defendant.

28 In the Circuit Court of the First Circuit, Territory of Hawaii.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Plaintiff,

vs.

HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Respondent.

Stamped $1.00

Injunction.

Bond on Appeal.

Know all men by these presents That the Honolulu Rapid Transit and Land Company, a Corporation, as Principal, and W. L. Castle as Surety, are held and firmly bound unto Henry Smith, Clerk of the Judicial Department, and to his successors in office, in the sum of Fifty Dollars ($50.), to the payment of which well and truly to be made the said Principal hereby binds itself, its successors and assigns, and said Surety hereby binds himself, his heirs, executors and administrators, by these presents.

The condition of this obligation is as follows:

Whereas, the above bounden Principal has appealed in the above entitled suit to the Supreme Court of the Territory of Hawaii from the decree writ of injunction and order made therein on the 26th day of October, A. D. 1907.

Now, therefore, If the said Principal shall pay or cause to be paid all costs to accrue in said suit in case it is defeated in said appellate court, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, the said parties have hereunto set their
29 hands and seals this 26th day of October, A. D. 1907.

HONOLULU RAPID TRANSIT AND LAND COMPANY, A CORPORATION.

(Sig.) By CASTLE & WITHINGTON, *Its Attorneys.*

(Sig.) W. L. CASTLE, *Surety.*

Endorsed: E. No. 1588. Reg. 1/328. Circuit Court First Circuit Territory of Hawaii. At Chambers. Territory of Hawaii, *vs.* Hon. Rapid Transit & Land Co., a corporation. Appeal Bond. Filed October 26, 1907, at 12:2 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington Attorneys for Defendant.

30 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii,

v.

HONOLULU RAPID TRANSIT & LAND COMPANY, a Corporation.

Appeal from Circuit Judge, First Circuit.

Argued January 6, 1908; Decided January 20, 1908.

Hartwell, C. J., Wilder, and Ballou, JJ.

Injunction—street railroad—threatened violation of statutory requirement of service.—The statute granting the defendant's franchise requiring it to maintain at all times a sufficient number of cars to be used for the carriage of passengers as public convenience may require, the circuit judge, at the suit of the attorney general, enjoined a threatened reduction of a long continued service on a particular street. Held, affirming the decree appealed from, that the duty imposed by the statute was sufficiently specific, that the evidence supported the finding that the proposed service was insufficient for public convenience, and that injunction was the proper remedy to restrain the threatened violation of statutory duty.

31 Opinion of the Court by HARTWELL, *C. J.*

This is an appeal by the defendant from a decree enjoining it from operating upon Liliha street in Honolulu cars less in number than are now operated and maintained, to wit: "One car every ten minutes both ways with exception in respect of the first car up or northerly and the last car down or southerly when only one way." The plaintiff's bill, brought by the attorney general, avers that the defendant is operating a single track electric railway upon certain specified streets in Honolulu over lines described in the bill and designated as the Liliha-Waialae, King street, Punahou, Nuuanu street, Manoa, Alakea street and Emma street lines, the various connecting points being set forth in the bill; that the Punahou, Nuuanu street, King street, Alakea street and Emma street lines and that portion of the Liliha-Waialae line between Wyllie and River streets are so operated on a ten minute schedule and that the lines are so arranged that cars of connecting lines meet nearly simultaneously at transfer points.

The bill further avers that the portion of Liliha street over which the company operates its cars is two miles in length and runs through a densely populated portion of Honolulu; that there are about 6000 residents who use the cars along that street and other streets over which the connecting lines operate; that the convenience of the public requires that the ten minute schedule continue on Liliha street and that the defendant in violation of the rights of the public and its

duties under the law and the requirements of its charter proposes to modify the Liliha-Waialae schedule so that cars will be operated over Liliha street between 9 o'clock in the morning and 4 o'clock in the afternoon and between 6 o'clock in the afternoon and 12 o'clock midnight under a twenty minute schedule; that reasonably prompt transportation facilities and making reasonably prompt transfers to connecting lines, preventing unnecessary delay in traveling over
32 Liliha street, require that a ten minute schedule be maintained on Liliha street; that the proposed change would prevent this and cause delay at the transfer points of the Liliha-Waialae line with connecting lines, unreasonably retard transaction of business and pursuit of pleasure to the detriment and irreparable injury of the public and contrary to its rights in that behalf; that certain residents adjacent to Liliha street have complained to the attorney general and represented to him that the convenience of the public generally, and Liliha street residents in particular, requires a ten minute service upon that street and that a service of a greater interval than ten minutes between cars would be a serious inconvenience to them and to the public generally.

The defendant in its answer avers that the court has no jurisdiction of the subject matter of the suit; that the allegations in the bill set forth no ground of complaint against the defendant or for relief by injunction or otherwise or cause for the exercise of the jurisdiction of the court; that the bill does not show that the Territory authorized the suit or is a proper party; admits that in many cases its schedules are so arranged that cars of connecting lines meet nearly simultaneously at transfer points, but denies that this is the case generally or that its line over Liliha street is about two miles long, being 7,101 feet, or that it runs through a densely populated district in which are about or approximately 6000 residents; denies that the convenience of the public requires a ten minute schedule or that the proposed change would not operate to the public convenience; avers that in the endeavor to improve the service of the Liliha-Waialae line it proposed a continuous fifteen minute service from Waialae to Liliha street but after conference with certain persons representing Liliha street patrons and others representing the Waialae portion of the route and after a thorough canvas- of the situation and discussion of all the facts in re-
33 gard to the necessity of travel at each end and the convenience of the general public it was unanimously agreed and, at the recommendation of said persons, the defendant consented to change its plan and modify the schedule of the Liliha-Waialae line as alleged in the bill, and was proceeding to do so at the time of the service of the temporary injunction which was made upon the filing of the bill; that the proposed service is all that the exigencies of travel along the line and the accommodation of the patrons of the road demand with a view to economical operation of the system and is an ample service under all the conditions.

The circuit judge heard the cause upon the pleadings and, finding upon the evidence adduced that public convenience required the number of cars now operated along Liliha street to be continued

and that a less number would be insufficient for the requirements of public convenience, ordered a permanent injunction, as prayed for a temporary injunction having been granted on the filing of the bill.

The defendant contends that equity has no jurisdiction but that mandamus is the only remedy to enforce a statutory obligation; that injunction does not lie to enforce action but only to prevent injury, and that the statutory provision (Sec. 870 R. L.) for forfeiture of franchise, if it fails, to comply with the requirements of the statute, is the exclusive remedy, but that mandamus would not lie, because no duty is imposed by law to run cars at any particular time; that the law gives the corporation discretion as to times of running its cars and that if there is any reserve power to control the discretion it is the legislature only and not the court which can exercise such power, so that until legislative action neither injunction nor mandamus lies.

The defendant claims that injunction will not lie upon the facts in the case because public convenience means the convenience of the public under all the circumstances,—such facilities as the traffic will warrant, as determined by the revenue derived therefrom,
34 and also because the court will not usurp the legislative function and require any particular service which is shown to be unprofitable to the company, and further, because the case shows that no permission was given by the superintendent of public works to change the switches so that the proposed schedule could be carried out, the application for an injunction being therefore premature.

The defendants brief, while contending that "no case in the highest court of any state or in the United States Supreme Court can be found to sustain the equitable jurisdiction in this case," goes on to state the rule as follows: "Our decisions are full of expressions showing that equity will not interfere with the management of corporations or grant injunctions except in clear cases and as a preventive measure against action which is likely to cause irreparable injury," citing *Wundenberg v. Martin*, 14 Haw. 167; *Brown v. Carter*, 15 Haw. 350.

On the point that equity has no jurisdiction the defendant relies especially upon *Shackley v. Eastern R. R. Co.*, 98 Mass. 93. In that case the railroad company had become the owner of the South Reading branch railroad under a statute which required it to run daily a freight train and four passenger trains over that road "so as to furnish reasonable accommodation to the public generally and the business along the line of said road." The plaintiffs brought a petition for an order to require the respondents to comply with the statute, alleging that although public convenience and necessity required running of the freight trains, the respondents, although often requested, had refused for ten months to do so to the great and unnecessary delay, expense, inconvenience and damage of the petitioners and of the public generally in the transportation of their freight along the line of this railroad. The case was treated as a proceeding on the equity side of the court the respondents demurring, alleging as one cause of demurrer that the petition
35 did not show that the petitioners had such an interest as entitled them to maintain it. The petitioners relied upon a stat-

ute providing that in case of disagreement as to what might be considered reasonable accommodation to the public the supreme court, upon application of any person interested, might appoint commissioners to settle the disagreement and investing the court with full equity power to enforce the provisions of the statute. The court held that the only right given by the statute was to apply to the court for appointment of commissioners to settle any disagreement as to what may be considered reasonable accommodation and that the portion of the act which invested the court with equity powers to enforce its provisions left the parties and the mode of proceeding to be regulated by the ordinary practice in chancery, and that "Any suit to compel the performance of a corporate duty in which the petitioners show no interest different from that of the whole public should be brought in the name of the Attorney General and cannot be maintained in the name of these petitioners," and further, that "it would seem that no relief could be afforded in equity for the cause stated in the petition either at the suit of individuals or of the Attorney General representing the commonwealth; but that the only remedy would be at law by mandamus, indictment or other appropriate process or by proceedings to annul the respondents' charter or franchise," citing *Attorney General v. Birmingham Ry. Co.*, 4 DeG. & S. 30; 3 M. & G. 453; *People v. Albany & Vermont R. R. Co.* 24 N. Y. 261.

In the former of these cases a railway company, formed in 1846 for the purpose of making a railway from A to B with diverging line to C_2 had in June 1851 nearly completed the line from A to B but had taken no steps to construct the diverging line. The attorney general, at the relation of certain parties claiming to be interested in the diverging line, filed an information to restrain the company from opening the line from A to B except with the intention of completing also the diverging line. It was held upon demurrer that the neglect to complete the whole line could not be regarded in the light of a public injury so as to warrant the interference of the attorney general. The court sustained the demurrer, saying, "Undoubtedly the attorney general has a right to represent the public, either in equity or in prosecution at law, in cases where the public interests are exposed to danger or mischief, and in the course of the argument several authorities were cited to show that such interference is recognized in equity; but the information in all those cases were directed to the repression of acts which the parties had no legal right to do and which are not only not authorized to be done but were, in fact, acts of public nuisance."

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In 24 N. Y. 261, the defendant, having completed its road between the termini named in its charter, had abandoned a portion. The attorney general brought suit in the name of the people for an injunction to restrain the selling, taking up or removing of fixtures on the portion which had been abandoned and that the defendant be required to operate it for public use. The court held that the railroad act under which the company was organized, being permissive, imposed no contract obligation. The bill was therefore dismissed, four of the judges being of the opinion "that a

corporation is under a legal obligation to exercise its franchises and that it has not the option to discontinue a portion of its road and forfeit its franchises," but all agreed that the remedy was not in equity for specific performance but by "mandamus, indictment, or, at the election of the people, by proceeding to annul the existence of the corporation."

It is unnecessary to comment upon these cases further than to observe that they merely illustrate the rule that equity does
37 not act when there is adequate legal remedy, that its compulsory powers will not be exercised when mandamus will accomplish the same purpose and that in the absence of a contractural obligation to construct and operate a railroad mandamus will not lie to compel its construction and operation. The same remark applies to *Rogers Locomotive Works v. Erie Ry. Co.*, 20 N. J. Eq. 379; *Delaware, etc. Co. Stock-Yard Co.*, 45 N. J. Eq. 50; *New York, etc. Ry. Co. v. Montclair*, 47 N. J. Eq. 591, and to *State v. Ry. Co.* 62 N. H. 29, cited by defendant. Nor is the plaintiff obliged to wait until the defendant shall have accompoished a violation of its charter obligation to provide a sufficient number of cars for the public convenience before bringing proceedings to prevent the loss and inconvenience which would result therefrom. The defendant argues that this is not an injunction against a positive act but against inaction, saying, "'The court by a curious process of reasoning holds that an injunction, the effect of which is to compel us to run cars, is an injunction to prevent us from running cars, the difficulty in the court's mind being that what is prevented is not running." A right cannot be enforced, says the defendant, by the aid of an injunction unless in the case of a threatened breach of a negative covenant where irreparable injury can be shown; but injunctions are common which, in effect, require that nothing be done to disturb existing rights or conditions. Thus injunctions are granted restraining a telephone or telegraph company from authorized discontinuance of its service, a customer not being required to postpone his remedy until the service is cut off. See *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238; *Smith v. Gold, etc. Tel. Co.*, 42 Hun. 454.

The defendant's claim that its right to regulate the operations of its railway includes the right to determine for itself at what intervals its passenger cars shall be run is not tenable. The statute requires that it shall at all times maintain a sufficient number
38 of cars to be used upon said railway for the carriage of passengers as public convenience may require (meaning, as we understand the statute, that the defendants actually operate and not merely, as it suggests, keep the cars in condition for using them), although "other cars designed for the carriage of mails, parcels and goods" may be such as the association "may deem necessary." Sec. 841 R. L.

Undoubtedly there are many administrative details in maintaining and operating a street railway more or less affecting its efficiency in serving the public interest which are necessarily and finally determined by the railway officials and are not within the power of equity to supervise and direct; but the defendants claim that the furnishing

of sufficient cars for public convenience on Liliha street is a matter of which it is the sole judge goes too far, for it would admit a similar claim in respect of any other street over which its line is established and include a right to run no cars on such portions of its line as it though- fit, and in some cases would amount to repudiating expressed contractual obligations imposed upon the defendant by acceptance of its charter.

Decisions upon the exercise of judicial power concerning the maintenance or operation of railroads or of branch roads which refer to corporations authorized but not required by statute to construct and maintain railroads are not in point. *Commonwealth v. Fitchburg R. R. Co.* 12 Gray, 180, held that statutory power to construct and maintain branch railroads did not impose a legal duty to maintain them and that it was for the corporation to judge what was necessary or reasonable "except in those cases where the legislature has expressly intervened in the first instance." It is true that the court said that public wants were "measured by the business actually done," that "if trains run at reasonable and moderate fares cannot be supported it is because they are not needed," and that it was the corporation's right as well as duty "to exercise a sound discretion in the use of its capital lest by exhausting it upon trains that were not required by the public wants it should deprive itself of the means of running at reasonable rates those that were." So *State v. Helena P. & L. Co.*, 22 Mont. 391. *Ohio & Mississippi Ry. Co., v. People*, 120 Ill. 200, held that mandamus will not lie to compel the company to increase the number of its trains over a branch road, the company having no funds with which to do so its running expenses having exceeded its earnings over $400,000 from the time of its purchase. The court spoke of the duty of the defendant to afford adequate facilities "to be judged of and governed chiefly by the amount of business," and that although as a general rule courts will not interfere with the management of a railway in determining questions relating to the operation of its road, except where the act sought to be enforced is specific, held that the ordinary incentives of self interest and to avoid the common law liability of a common carrier had not attained the desired end in that case and that *quo warranto* and not mandamus was the proper remedy in order that the company should be deprived of its franchise and another company could be formed to show whether under proper management it could be self sustaining, for if this could not be shown then there was no demand for the road and the sooner the state revoked the franchise the better. Mandamus was denied, however, because the statute did not require an increased number of trains. Of course where reasonable facilities are already furnished there is no occasion for judicial action. Thus *Chicago & Eastern Ill R. R. Co. v. People*, 22 Ill. 398, refused mandamus to compel the location of a station at another point than the company had designated on the ground that the evidence failed to show that the proposed station would not afford "reasonably safe, accessible, and convenient conditions for the public." The same view was taken by the United States Supreme Court in *Atlantic Coast Line R. R. Co. v. Horton, et al.*, 207 U. S. —, as reported in advance sheets. The supreme court of South Carolina had

granted a mandamus to compel the railroad company to stop two of its through trains from Jersey City to Tampa at a station called Latta, pursuant to an order of the railroad commissioners. Latta had a population of 453, having several local trains for stations along the road and one through Pullman train which stopped there. The only objection to the trains was their want of speed. The court thought that the company had furnished such reasonable accom-odations to the people at Latta as it could fairly and properly be called upon to give.

It is urged that "a bill in chancery would not lie to enforce the specific performance of duties requiring continuous personal labor and care," *McCann v. South Nashville R. R. Co.*, 2 Tenn. Ch. 773; and that an injunction does not lie to enforce a contract requiring continuous acts. The injunction in this case merely precludes the violation of an obligation imposed by the defendant's charter.

As to the defendant's claim that it does not appear that irreparable injury would result, it is enough that the proposed act would be a violation of the statutory obligation of the defendant. *Attorney General v. R. R. Companies*, 35 Wis. 425.

We do not sustain the defendant's contention that the suit is premature pending the result of its application to the superintendent of public works for permission to change its switches to conform to the proposed 10-20 minute service. The statute, Sec. 843 R. L., provides that the company "shall make reasonable and just regulations, with the consent and approval of the governor, regarding the maintenance and operation of said railway on and through said streets," and failing to do so "the superintendent of public works with the approval of the governor may make them." This does not appear to us to be a grant to the association or to the executive of discretionary
41 power to determine how many cars shall be run and at what intervals. A separate section, 841, provides that the company "shall at all times maintain a sufficient number of cars." A grant either to the company or to the executive of such an important power as to determine how many cars are required for this purpose would naturally and properly be expressed or clearly implied. Its exercise would not call for any public hearing but ordinarily would be *ex parte* on the company's showing. A matter so important to the public is subject to judicial inquiry and determination unless, as is not the case here, shown in clear language to be entrusted to executive discretion or to the discretion of the corporation.

Many cases are cited by the defendant holding that "mandamus to compel a railroad to do a particular act can be issued only when by statute there is a specific legal duty on its part to do that act." *Northern Pacific R. R. Co. v. Dustin*, 142 U. S. 492; *People v. Brooklyn Heights Ry. Co.*, 172 N. Y. 90; *Nashville Ry. v. State*, 155 Ala. 401; *State v. Patterson, etc. Ry. Co.*, 47 N. J. 505; *San Antonio Street Ry. v. State*, 90 Tex. 520; *State v. Kansas City Ry. Co.* 25 So. 127 (La.); *Florida Central Ry. Co. v. State*, 18 So. 103, (Fla.); *Raymond v. County of Stearns*, 18 Minn. 40.

Attorney General v. Salem, 103 Mass. 138, was an information in the nature of *quo warranto* alleging that under a statute for supply-

ing the city of Salem with water the defendant had constructed works at the expense of $1,000,000 or more and issued scrip or bonds to that amount, the statute providing that the city council should establish water rates to provide for payment of interest and not less than one per cent. annually on the principal of the loan, and that the net income should be set apart as a sinking fund for its payment; further alleging that the city, disregarding these provisions, had established nominal water rates leaving property and poll taxes to
42 pay the interest, etc., and praying that it be made to answer by what warrant it was acting thus and be enjoined from supplying water at nominal rates and taxing inhabitants to pay the operating expenses and the loan. The court held that this was not the appropriate remedy to enforce performance of duties imposed by law or to restrain improper use of a franchise which does not work a forfeiture, declining to decide whether the attorney general could bring a bill in equity to redress any public wrong but holding that this was not a public wrong. *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, was an information in equity by the attorney general to restrain the defendant from carrying on any other than its ice business. The court held that as the defendant was a private trading corporation and as public rights were not endangered injunction did not lie, saying that the only cases in which it had sustained informations in equity by the attorney general were those of public nuisance affecting the public safety or convenience and requiring immediate judicial interposition, like obstructions of highways or navigable waters and trusts for charitable purposes where a breach of the trust could not be effectively redressed except by suit in behalf of the public.

The present case is not that of a threatened public nuisance but it affects the public and therefore requires immediate judicial interposition provided the prescribed duty is sufficiently specific. The statute does not specify how many cars shall be required to be run in order to satisfy the public convenience, and therefore the objection to a writ of mandamus that the need of a stated number could not be judicially determined might have considerable force if it were not that a definite and clear standard of public convenience in this regard has been established by the defendant corporation in its maintenance, since it began operations or for about six years, of a ten minute schedule upon Liliha street. Public convenience requires, as
43 shown by the evidence and as would be clear in the nature of the thing, that the proposed diminution of service upon that street shall not be made. While it might be difficult to say in advance what number of cars would be sufficient, owing to the vagueness of the terms "sufficient" and "public convenience," there is nothing uncertain concerning the actual inconvenience of a reduction of the Liliha street service or in the public convenience requiring its continuance in order to conform with the time schedule on the connecting lines in the city of Honolulu.

No one pretends that the public can require for its convenience a more frequent service over the defendant's railway system than the defendant corporation can afford or that public demand, as shown by the use of the cars, is not a material factor in determining what

service will suffice for public convenience, but there is no evidence that the ten minute service heretofore given on Liliha street has not paid at least operating expenses or that the continuance of that service would preclude the company from paying dividends. Liliha street is not a branch railroad. It is one of the streets of Honolulu upon which the defendant established originally its railway system. The defendant is not entitled to reduce the service upon any one street in its system to the inconvenience of the public simply because it has not made profit from the receipts from that one street. A railroad company may be required by the state railroad commission to make reasonable connections with other roads so as to promote the convenience of the traveling public by running an additional train for that purpose although the running of said train, taken by itself, would be unprofitable. "This is so because as the primal duty of a carrier is to furnish adequate facilities for the public, that duty may well be compelled although by doing so as an incident some pecuniary loss from rendering such service may result." *Atlantic Coast Line v. N. Car. Corp. Com'n*, 206 U. S. 26. The defendant
44 therefore is not deprived of its property without due compensation. Whether, as suggested by the circuit judge, a demand for more frequent car service over that portion of the line between Kainuki, on the Waialae road, and the junction can be enforced by mandamus because those who desire more cars there are now insufficiently supplied is a question not before us, but we see no occasion for the defendant's suggestion that the decision of the court below "is a bid to the people of Waialae to ask for a ten minute service throughout the entire day at the expense of the revenue of the company, and if it is to be sustained the principle is established that every cent of the revenue derived from transportation shall go back to transportation without returning one cent on the capital contributed by the stockholders, much less any income on their investment."

As to the defendant's contention that the Liliha street line did not pay, the figures offered in support of this view were not convincing and hardly rebut the presumption, if any there be, arising from the continued use for about six years of the line. As operated at present only one car every twenty minutes on the Liliha street line goes through the heart of the city, alternate cars connecting with King street stopping at the next switch beyond, so that practically all passengers transfer to and from the King street cars. Thus a great majority of passengers returning from the heart of the city pay their first fare on the King street line and get a transfer, none of which receipts are credited, in the statement given, to the Liliha street line; whereas if the Liliha street car ran a few blocks further through the business section of the city almost all of this would appear as receipts from this line. The defendant's method of apportioning operating expenses, if attempting anything more than a rough approximation, is also open to criticism so that altogether the corporation, placed on the defensive by its own conduct of its business for many
45 years, fails to rebut the case of the plaintiff.

Difficult as it might be to determine upon evidence the precise number of cars which should be maintained by the defend-

ant or how public convenience may require them to be used upon the railway in order to discharge the statutory obligation imposed by Sec. 841 R. L., the court should not be deterred from undertaking this task by the argument that if the time schedule were reduced by imperceptible degrees it would be impossible to draw the line as to where public convenience began and ended. Undoubtedly there is a considerable margin within which the discretion of the directors of the corporation could not be disturbed, but the court must take each case as it finds it and decide whether the existing facts or whether, as in this case, the proposed action of the company fulfils the requirement of the statute. The method of disposing of a case like this is well illustrated in the opinion of the court in *Atlantic Coast Line R. R. Co. v. Horton, supra.*

In such an inquiry the express wishes of the patrons of the road is far from conclusive as it may be assumed beforehand that they would be unanimous in wanting all they think they can get. A case supported only by such evidence would have to be particularly strong to warrant the interposition of a court.

In the case at bar, however, there are surrounding circumstances which support the contention of the witnesses on behalf of the plaintiff. The fact that a ten minute service has been maintained upon Liliha street ever since the defendant's railway started, and that there has been no decrease but a steady increase in the population of the district served with a definite prospect of further increase, presents a strong *prima facie* showing of the measure of public convenience. The fact that the remainder of the defendant's system, except two outlying districts, is based on a ten minute service
46 is also a circumstance tending to show the inconvenience of either a fifteen minute or twenty minute service upon this street.

In addition to the claim of the unprofitableness of the Liliha street line, to which we have referred, the defendant presented at the hearing two reasons to meet this *prima facie* case. All of these appear inadequate. The first reason is that increase in business upon the Waialae section at the other end of the city justifies an increase in the number of cars on that line which it was proposed to secure by cutting down the Liliha street schedule and running through cars. It is manifest, however, that whatever may be the claims of the residents of Waialae the people served by the Liliha street line should not be made to suffer at the cost of a decrease in their service. The second reason given was that making connections with Liliha street cars often disorganized the King street line, which being the main trunk line, threw the whole system into confusion. The evidence does not clearly sustain this claim, and, moreover, this is a distinct question from the number of cars to be operated on Liliha street; the reasonableness of making a King street car wait at the connecting point for a Liliha street car in case the latter is late is an independent question which is not before us.

Taking the case in any aspect the Judge's finding was fully sustained by evidence.

It appears to us that none of the cases cited by the defendant and

none of which we are otherwise informed would, under the circumstances of this case, justify a refusal of the injunction.

Decree appealed from affirmed.

E. C. Peters (C. R. Hemenway, Attorney General, with him on the brief) for the Territory.

D. L. Withington (Castle & Withington on the brief) for defendant.

ALFRED S. HARTWELL.
A. A. WILDER.
SIDNEY BALLOU.

Endorsed: Supreme Court Territory of Hawaii. October
47 Term 1907. Territory of Hawaii, by C. R. Hemenway, Attorney General *vs.* Honolulu Rapid Transit & Land Company. Opinion. Filed January 20, 1908, at 10 o'clock A. M. J. A. Thompson, Clerk.

48 In the Supreme Court of the Territory of Hawaii. October Term, 1907.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii,

v.

HONOLULU RAPID TRANSIT & LAND CO., a Corporation.

Findings of Fact.

Upon appeal to the Supreme Court of the United States from the affirmation of the decree of injunction against the respondent (*Territory of Hawaii v. Honolulu Rapid Transit & Land Co.*, 18 Haw. 553), the respondent appellant has applied for findings of fact in accordance with the act of April 7, 1874, 18 Stats. at Large, 27; 1 Suppl. Rev. Stats. 7. Were the question open this court would be inclined to hold that this act was not applicable to the Territory of Hawaii, as our Organic Act originally provided that "the laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." Organic Act, April 30, 1900, Sec. 86. This having established an appellate practice in this Territory identical to the law applicable to states (*Equitable Life Assurance Society v. Brown*, 187 U. S. 308) there does not appear to be anything in the subsequent provision that writs of error and appeal may also be taken in cases where the amount involved exceeds $5000 (act of March 3, 1905), which indicates an intention thereby to put into effect a statute relating to the practice of territories having the code procedure. The Supreme Court of the United States has, however, intimated that it holds the con-
49 trary opinion (*Bierce v. Hutchins*, 205 U. S. 340), and findings will be made in accordance with that ruling.

The court finds the following facts:

(1) The Honolulu Rapid Transit & Land Co. is a corporation organized in pursuance of and possessing a franchise granted by Act 69 of the Republic of Hawaii July 7, 1898, the franchise having been approved by the President of the United States June 25, 1900, in accordance with the provisions of Sec. 73 of the Organic Act of the Territory of Hawaii of April 30, 1900.

(2) Said company operates a single tract street railway system in Honolulu and among other lines of said system one known as the Liliha St.-Waialae line. The line on Liliha street was part of the first line operated by the company and has been operated as parts of various lines from and after September 1, 1901, and during all that time a ten-minute service has been given on that street.

(3) In 1904 the car service of the company was extended to Waialae, a suburb on the east side of Honolulu, the Waialae cars first running on a thirty-minute schedule to and from Pawaa junction.

(4) Since the latter part of 1905 a car has been run every twenty minutes during the day from the junction of Wyllie street and Liliha street to the terminus at Waialae, the line passing through the business portion of Honolulu of which the center is Fort street, while the alternate cars constituting the ten-minute service on Liliha street stopped at River street. Connections were made at the foot of Liliha street with the ten-minute service on the King street line and the bulk of the travel transferred at this point to and from the King street line which is the longest and most important line of the company.

(5) The population of Honolulu is about 40,000.

(6) The map of Honolulu in evidence, showing the street car system, may be referred to as part of these findings.

50 (7) The company proposed to change the service so as to give, with the same number of cars, a fifteen-minute service throughout the Liliha St.-Waialae line and procured permission from the superintendent of public works to change its switches so as to give this service. Objection was made by some of its patrons. After conferences with a committee which urged a ten-minute service throughout the line the company agreed that a compromise service would be given of twenty minutes during the entire day and ten minutes from 5:45 a. m. until 9 a. m. and from 4 p. m. to 6 p. m. The company applied to the superintendent of public works for permission to install the necessary switches so as to give this service. This suit was brought by the Attorney General at the request of dissatisfied residents of the district served by the Liliha street line.

(8) The evidence showed that public convenience required the continuance of a ten-minute service on Liliha street.

The court is of the opinion that the eighth finding is a finding of fact, but upon the appellant's contention that it is a mixed question of law and fact and its insistence that its rights in the Supreme Court of the United States would be prejudiced should the Supreme Court take its view of the matter, and there should be in the record no findings of fact upon which said eighth finding was based, the

court makes the following findings of the principal evidential facts leading to its eighth finding.

(8*a*) A ten-minute service on Liliha street has been continuously maintained since the beginning of the operation of the street railway system by the company in Honolulu, to wit, since about September, 1901.

(8*b*) During that period there has been a steady increase in the population of the district served by the Liliha street line.

(8*c*) Property in the section served by the Liliha street line has been purchased and houses built in reliance upon a ten-minute service.

51 (8*d*) There is a definite prospect of further increase in the population of the district served by the Liliha street line owing to a recent sale of homestead lots at Alewa by the government.

(8*e*) There was testimony of individual patrons tending to show that public inconvenience would result from the proposed change.

(8*f*) The entire system of the company is operated at a profit.

(8*g*) The evidence did not show either that the Liliha street line or the Liliha St.-Waialae line was operated at a loss.

(8*h*) The remainder of the defendant system except the two outlying districts of Manoa and Waialae is operated upon a ten-minute service.

Honolulu, May 7, 1908.

(Sig.) ALFRED S. HARTWELL.
(Sig.) A. A. WILDER.
(Sig.) SIDNEY BALLOU.

Endorsed: Supreme Court Territory of Hawaii. October Term 1907. Territory of Hawaii by Charles R. Hemenway, Attorney General of Hawaii *v.* Honolulu Rapid Transit & Land Co., a Corporation. Findings of Fact. Filed May 7, 1908, at 10 o'clock A. M. J. A. Thompson, Clerk.

52 In the Supreme Court of the Territory of Hawaii. October, A. D. 1907, Term, February, A. D. 1908, Session.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Complainant-Appellee,
vs.
HONOLULU RAPID TRANSIT & LAND COMPANY, a Corporation, Respondent-Appellant.

Injunction.

Decree.

The above entitled matter having come on regularly before this court upon appeal by the Honolulu Rapid Transit & Land Company, a corporation, from the decree and permanent restraining order of the Honorable J. T. DeBolt, First Judge of the Circuit Court of the

First Judicial Circuit of the Ter itory of Hawaii, signed, entered and filed in said cause in said First Circuit Court on the 24th day of October, A. D. 1907;

Now Therefore; it is hereby ordered, adjudged and decreed that the decree appealed from be and the same is hereby affirmed.

Dated this 15th day of February, A. D. 1908.

The Court:

By J. A. THOMPSON, *Clerk.*

O. K.
CASTLE & WITHINGTON.

Endorsed: In the Supreme Court of the Territory of Hawaii. Territory of Hawaii, by Charles R. Hemenway, etc. *vs.* Honolulu Rapid Transit & Land Co. etc. Decree. Filed February 15, 1908, at 10:20 o'clock A. M. J. A. Thompson Clerk. E. C. Peters, of Counsel for Complainant.

53 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

[Seal Supreme Court, Territory of Hawaii.]

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Appellee,
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Appellant.

Injunction.

Appeal.

The above named appellant, the Honolulu Rapid Transit and Land Company, a Corporation, conceiving itself aggrieved by the order and judgment made and entered on the 15th day of February, 1908, in the above entitled proceeding, does hereby appeal from the said order and judgment to the Supreme Court of the United States, and prays that its appeal may be allowed for the reasons specified in the assignment of errors herewith, and that a transcript of the record and proceedings, and papers upon which said order and judgment was made, and a statement of facts of the case, shall be made and certified by this court and transmitted to the Supreme Court of the United States, duly authenticated.

Dated, Honolulu, Territory of Hawaii, March 9, 1908.

CASTLE & WITHINGTON,
Attorneys for the Honolulu Rapid Transit and Land Company, Appellant.

54 And now, to wit, on the 20th day of March, 1908, it is ordered that the appeal be allowed as prayed for.

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the foregoing Appeal and Citation, and receipt of a copy thereof, admitted this 20th day of March, 1908.

E. C. PETERS,
Of Counsel for the Territory of Hawaii.

55 [Endorsed:] No. —. Supreme Court Territory of Hawaii. Territory of Hawaii, By Charles R. Hemenway, Attorney General of the Territory of Hawaii, Appellee, *vs.* Honolulu Rapid Transit and Land Company, Appellant. Appeal. Filed March 20 1908 at 11 o'clock A. M. J. A. Thompson Clerk Supreme Court Territory of Hawaii. Castle & Withington Attorneys for H. R. T. & L. Co.

56 In the Supreme Court of the United States.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Appellee,
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Appellant.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes the Honolulu Rapid Transit and Land Company, a Corporation, appellant in the above entitled action, and says that in the record of the proceedings in said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That there is error in affirming the decree and permanent restraining order of the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, from operating upon Liliha street in Honolulu cars less in number than now operated and maintained, to wit, one car every ten minutes both ways excepting the first car up or Northerly and the last car down or Southerly when only one way between the hours of 5:45 a. m. and 11:42 p. m.

2. That there is error in holding that the Circuit Court of the First Circuit, Territory of Hawaii, had any jurisdiction of the subject matter of the statute, and in holding that the allegations of the bill set forth any ground of complaint against the defendant or for relief by injunction or otherwise or calls for the exercise of the jurisdiction of that court in equity.

57 3. That there is error in holding that equity has jurisdiction and that mandamus is not the only remedy to enforce a statutory obligation of the character alleged and to award the relief sought.

4. That there is error in holding that Section 7 of the Act of the Republic of Hawaii of July 7, 1898, as ratified by Congress and approved by the President (Revised Laws, Sec. 841), imposes any clear

duty to run the cars at any particular time such as could be enforced either by injunction or mandamus.

5. That there is error in holding that the franchise does not impose the discretion as to the times of running the cars in the corporation and in holding that a court of equity has any power to control that discretion.

6. That there is error in holding that the reserved power of control of the discretion of the corporation in regulating the operation of its railway and fixing its schedule and the times of running the cars is not permitted by said Act, and particularly by Section 9 thereof, to the Governor of the Territory of Hawaii or the Superintendent of Public Works with the approval of the Governor.

7. That it is error to overrule the contention of appellant that if the reserved power to control the discretion of the corporation in regard to the maintenance and operation of its road is not reserved to the Governor of the Territory of Hawaii or the Superintendent of Public Works with the approval of the Governor, that it is reserved to the control and discretion of the Legislature only and the court has no power to exercise such control.

8. That there is error in holding that public convenience required the maintenance of the service on Liliha street set out in the decree, and in finding that the proposed service was insufficient for public convenience.

58 9. That there is error in overruling the defendant's contention that public convenience means the convenience of the public under all the circumstances, such facilities as the traffic will warrant as determined by the revenue derived therefrom, and that courts will not usurp a legislative function and require a particular service shown to be unprofitable to the Company.

10. That there is error in holding that an injunction could be maintained in this case, in view of the evidence, which showed that no permission had been given by the Superintendent of Public Works to change the switches so that the proposed schedule could be carried out.

11. That there is error in denying the contention of the defendant that the remedy of *quo warranto* provided by Section 36 of the Act (Sec. 870 R. L.) to be instituted by the Superintendent of Public Instruction with the consent of the Governor was an exclusive remedy and that the Attorney General had no authority to institute this proceeding in the name of the Territory.

12. That there is error in holding that decisions upon the exercise of judicial power concerning the maintenance or operation of railroads or of branch roads which refer to corporations authorized but not required by statute to construct and maintain railroads are not in point.

13. That there is error in denying the contention of the defendant that a bill in chancery would not lie to enforce specific performance of duties requiring continuous personal labor and care, and that an injunction does not lie to enforce a contract requiring continuous acts, and in holding that the injunction in this case merely precludes

the violation of an obligation imposed by the defendant's charter.

59 14. That there is error in denying the defendant's contention that it does not appear that irreparable injury would result on the ground that it is enough that the proposed act would be a violation of the statutory obligation of the defendant.

15. That there is error in holding that a grant to the Company of the power to determine how many cars are required would naturally and properly be expressed or clearly implied, and that a matter so important to the public is subject to judicial inquiry and determination, unless, as is not the case here, shown in clear language to be entrusted to the discretion of the corporation.

16. That there is error in holding that a definite and clear standard of public convenience has been established to be used on Liliha street has been established by the defendant corporation in its maintenance since it began operation, or for about six years, upon a 10-minute schedule upon Liliha street, and that while it might be difficult to say in advance, owing to the vagueness of the terms "sufficient" and "public convenience," what will be required, there is nothing uncertain concerning the natural inconvenience of the reduction of the Liliha street service or in the public convenience requiring its continuance in order to conform to the time schedules on the connecting lines.

17. That there is error in holding that the defendant is not entitled to reduce the service on any one street in its system to the inconvenience of the public simply because it has not made profits in the receipts in that one street.

18. That there is error in holding that the fact that a 10-minute service had been maintained since the railroad started on

60 Liliha street, that there has been no decrease but a steady increase in the population served, with a further prospect of a further increase, presents a strong *prima facie* showing of the measure of the public convenience.

19. That there is error in denying that plaintiff's contention that it was a proper exercise of its discretion to equalize the service upon the Liliha street-Waialae line, so that, without decreasing an existing service, it should be equalized in proportion to the business done upon the line, the effect of which would be to give more cars to the Waialae line and less to the Liliha street section; and that it is error to hold that the people served by the Liliha street line should not be made to suffer at a cost of a decrease in their service, when the purpose was to equalize the service so that patrons could be equally served over the whole line.

DAVID L. WITHINGTON,
CASTLE & WITHINGTON,
Attorneys for Honolulu Rapid Transit and Land Company, Appellant.

61 [Endorsed:] No. —. Supreme Court of the United States. Territory of Hawaii, By Charles R. Hemenway, Attorney General of the Territory of Hawaii, Appellee, *vs.* Honolulu Rapid Tran-

sit and Land Company, Appellant. Assignment of Errors. Filed March 20 1908 at 11 o'clock A. M. J. A. Thompson Clerk Supreme Court Territory of Hawaii. Castle & Withington Attorneys for H. R. T. & L. Co.

62 In the Supreme Court of the United States.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Appellee,

vs.

HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Appellant.

Affidavit of C. G. Ballentyne.

ISLAND AND COUNTY OF OAHU, *Territory of Hawaii*, ss:

C. G. Ballentyne, being duly sworn, on oath deposes and says: That he is the Manager of the Honolulu Rapid Transit and Land Company, Appellant in the above entitled cause, and that as such Manager he is familiar with the cost of operation, maintenance and all other expenditures of said Company and of the receipts of the same; that he has made a careful analysis of the cost of operation of said railroad on Liliha street, in accordance with the judgment of the Supreme Court of the Territory of Hawaii; that the railroad is now operating two cars exclusively on Liliha street, and that the cost of operation per year of said cars, including the proportionate cost of maintenance chargeable to the same, is Sixteen Thousand Eight Hundred Eighty-one and 25 100 ($16,881.25); that the cost per year, if the same was operated on a 10-20 minute schedule,
63 according to the plan proposed, would be Eleven Thousand Two Hundred Fifty-six and 60/100 Dollars ($11,256.60); that if but one car were operated on the 15-minute headway on said Liliha street, which would be sufficient in the judgment of the Company to accommodate the public, the cost per year would be Eight Thousand Four Hundred Forty-four and 62/100 Dollars ($8444.62); that, from the experience in the operation of said road both upon said street and other streets in the City of Honolulu, the receipts would not be materially affected whether the schedule was 10-minute, 15-minute or 10-20 minute; that the franchise of said Company has more than twenty years yet to run; and that the value of the property right in controversy in said suit exceeded the sum or value of Five Thousand Dollars ($5000).

C. G. BALLENTYNE.

Subscribed and sworn to before me this 28th day of February, 1908.

[SEAL.] P. L. WEAVER,
Notary Public.

Endorsed: Original —. No. —. Supreme Court of the United States. Territory of Hawaii, By Charles R. Hemenway, Appellee, *vs.* Honolulu Rapid Transit and Land Company, Appellant. Affidavit of C. G. Ballentyne. Filed March 20, 1908, at 11 o'clock A. M. J. A. Thompson Clerk Supreme Court, Territory of Hawaii. Castle & Withington Attorneys for Appellant.

64 In the Supreme Court of the United States.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Appellee,
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Appellant.

Bond on Appeal.

Know all men by these presents: That we, the Honolulu Rapid Transit and Land Company, George P. Castle and Charles H. Atherton, all of Honolulu, in the County and Island of Oahu and Territory of Hawaii, are held and firmly bound unto the above named Territory of Hawaii, by Charles R. Hemenway, Attorney General of the Territory of Hawaii, in the sum of five hundred dollars to be paid to the said Territory of Hawaii, by Charles R. Hemenway, Attorney General of the Territory of Hawaii, its and his successors and representatives, for the payment of which well and truly to be made, we bind ourselves, and each of us, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 25th day of February, 1908.

Whereas, the above named appellant has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of the Territory of Hawaii:

Now, therefore, the condition of this obligation is such that
65 if the above named appellant shall prosecute said appeal to effect and answer all damages and costs, if it shall fail to make good said appeal, then this obligation shall be void. Otherwise to remain in full force and effect.

HONOLULU RAPID TRANSIT AND LAND COMPANY. [SEAL.]

By Its President, L. T. PECK.
By Its Treasurer, CHAS H. ATHERTON.
CHAS. H. ATHERTON.
GEORGE P. CASTLE.

Approved.
ALFRED S. HARTWELL.
Chief Justice.

Endorsed: — No. —. Supreme Court of the United States. Territory of Hawaii, by Charles R. Hemenway, Attorney General of the Territory of Hawaii, Appellee *vs.* Honolulu Rapid Transit and Land

Company, Appellant. Bond on Appeal. Filed March 20, 1908, at 11 o'clock A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii. Castle & Withington Attorneys for H. R. T. & L. Co.

66 In the Supreme Court of the United States.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Appellee,
vs.
HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation, Appellant.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To the Territory of Hawaii, by Charles R. Hemenway, Attorney General of the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein the Honolulu Rapid Transit and Land Company is appellant, and you, the said Territory of Hawaii, by Charles R. Hemenway, Attorney General of the Territory of Hawaii, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii, this 20th day of March, in the year of our Lord one thousand nine hundred eight.

[Seal Supreme Court, Territory of Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

67 [Endorsed:] — No. —. Supreme Court of the United States Territory of Hawaii, by Charles R. Hemenway, Attorney General of the Territory of Hawaii, Appellee, *vs.* Honolulu Rapid Transit and Land Company, Appellant. Citation on Appeal. Filed March 20 1908, at 12 o'clock noon. J. A. Thompson Clerk Supreme Court Territory of Hawaii Castle & Withington Attorneys for H. R. T. & L. Co.

68 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Att'y General of the Territory of Hawaii, Appellee,

vs.

HONOLULU RAPID TRANSIT & LAND CO., a Corporation, Appellant.

Order Extending Time to Docket Case and File Record on Appeal.

For good cause shown it is hereby ordered that the time within which the Appellant herein shall docket the case and file the record thereof with the Clerk of the Supreme Court of the United States on the appeal herein taken by said Appellant to the Supreme Court of the United States, be and it hereby is extended and enlarged to and including the 30th day of May, 1908.

Dated, Honolulu, Oahu, May 8, 1908.

(Signed) ALFRED S. HARTWELL.

[SEAL.] *Chief Justice Supreme Court, Territory of Hawaii.*

Endorsed: Supreme Court Territory of Hawaii. October Term 1907. Territory of Hawaii *v.* Honolulu Rapid Transit & Land Co. Bill for Injunction. Order Extending Time for Filing Record in Supreme Court of United States. Filed May 8, 1908, at 10:25 o'clock A. M. J. A. Thompson, Clerk Supreme Court Territory of Hawaii.

69 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Att'y General of the Territory of Hawaii, Appellee,

vs.

HONOLULU RAPID TRANSIT & LAND CO., a Corporation, Appellant.

Præcipe Designating Parts of Record to be Included in Transcript.

To James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii:

You are requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii in the cause entitled "Territory of Hawaii by Charles R. Hemenway, Attorney General of the Territory of Hawaii, Complainant, *vs.* Honolulu Rapid Transit & Land Company, a corporation, Respondent," the same being a bill in equity for an injunction, which said transcript is to be filed in the Supreme Court of the United States pursuant to an appeal taken and allowed in said cause, and to include in such transcript of record the following papers and exhibits, to-wit:

1. The Complainant's Bill of Complaint;
2. Temporary Injunction;

3. Answer of Respondent;

4. Complainant's Replication;

70 5. Opinion of Circuit Judge J. T. De Bolt;

6. Map of city of Honolulu by C. V. E. Dove, being Complainant's Exhibit G;

7. Decree and Perpetual Writ of Injunction entered by the Circuit Judge on October 24, 1907, together with, annexed thereto, Order to High Sheriff for Service of said Writ and also Return of Deputy High Sheriff;

8. Appeal and Notice of Appeal by the Honolulu Rapid Transit & Land Company to the Supreme Court of Hawaii;

9. Bond on Appeal to the Supreme Court of Hawaii;

10. Opinion of Supreme Court of Hawaii;

11. "Findings of Fact" by Supreme Court of Hawaii, dated and filed May 7, 1908;

12. Decree of Supreme Court of Hawaii;

13. Appeal of Honolulu Rapid Transit & Land Company to the Supreme Court of the United States, together with, annexed thereto, Order allowing said last mentioned Appeal and also the Acknowledgment of Service of Appeal and of the Citation on Appeal;

14. Assignment of Errors, on Appeal to Supreme Court of United States;

15. Affidavit of C. G. Ballentyne as to value, *in re* said last mentioned appeal;

16. Bond on Appeal to the Supreme Court of the United States;

17. Citation on said last mentioned Appeal;

18. Order enlarging time for Docketing the Case and Filing the Record with the Clerk of the Supreme Court of the United States;

19. This Praecipe to the Clerk of the Supreme Court of Hawaii;

71 20. Certificate of Clerk of Supreme Court of Hawaii as to authenticity of Record on Appeal.

Dated Honolulu, May 8, 1908.

Respectfully,

CASTLE & WITHINGTON,
ANTONIO PERRY,
Attorneys for Honolulu Rapid Transit & Land Company, Appellants.

72 [Endorsed:] Supreme Court, Territory of Hawaii. October Term, 1907. Territory of Hawaii, *v.* Honolulu Rapid Transit & Land Co. Bill for Injunction. Praecipe. Filed May 8 1908 at 2:45 o'clock P. M. J. A. Thompson, clerk.

73 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

TERRITORY OF HAWAII, by CHARLES R. HEMENWAY, Attorney General of the Territory of Hawaii, Appellee,

vs.

HONOLULU RAPID TRANSIT & LAND CO., a Corporation, Appellant.

Certificate of Clerk to Transcript of Record.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing pages numbered 1 to 52 inclusive, pages numbered 62 to 65 inclusive and page 68 contain full, true and correct copies of the following papers and documents: 1. The Complainant's Bill of Complaint; 2. Temporary Injunction; 3. Answer of Respondent; 4. Complainant's Replication; 5. Opinion of Circuit Judge J. T. DeBolt; 6. Map of City of Honolulu by C. V. E. Dove, being Complainant's Exhibit "G"; 7. Decree and Perpetual Writ of Injunction entered by the Circuit Judge on October 24, 1907, together with, annexed thereto, Order to High Sheriff for Service of said Writ and also Return of Deputy High Sheriff; 8. Appeal and Notice of Appeal by the Honolulu Rapid Transit & Land Company to the Supreme Court of the Territory of Hawaii; 9. Bond on Appeal to the Supreme Court of Hawaii; 10. Opinion of Supreme Court of Hawaii; 11. "Findings of Fact" by Supreme Court of Hawaii, dated and filed May 7, 1908; 12. Decree of Supreme Court of Hawaii; 13. Affidavit of C. G. Ballentyne as to Value, *in re* Appeal to the Supreme Court of the United States; 14. Bond on Appeal to the Supreme Court of the United States; 15. Order enlarging time for Docketing the Case and Filing the Record with the Clerk of the Supreme Court of the United States, (the Original of the last mentioned order was on the 8th day of May 1908 transmitted to the Clerk of the Supreme Court of the United States),—the same including all of the Pleadings and Record Entries, Decree and other papers as enumerated and entitled hereinabove, in the above entitled cause in the Supreme Court of the Territory of Hawaii, and on proceedings on Appeal in the Supreme Court of the United States, as full, true, correct and complete as the same are on file and of record in my office as Clerk of said Supreme Court of the Territory of Hawaii in said cause, and herewith transmitted to the said Supreme Court of the United States in pursuance of the Præcipe of the Attorneys for the Appellants attached hereto, being pages numbered from 69 to 72 inclusive;

74 I do further certify that the Original Appeal of Honolulu Rapid Transit & Land Company to the Supreme Court of the United States, together with, annexed thereto, Original Order allowing said Appeal and Original Acknowledgment of Service of Appeal and Citation on Appeal, the Original Assignment of Errors, being pages numbered from 53 to 61 inclusive, and the Original Citation

on Appeal, being pages numbered from 66 to 67 inclusive, are hereto attached and herewith returned.

In testimony whereof I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, this 12th day of May, 1908, at my Office in Honolulu in the Island and County of Oahu.

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

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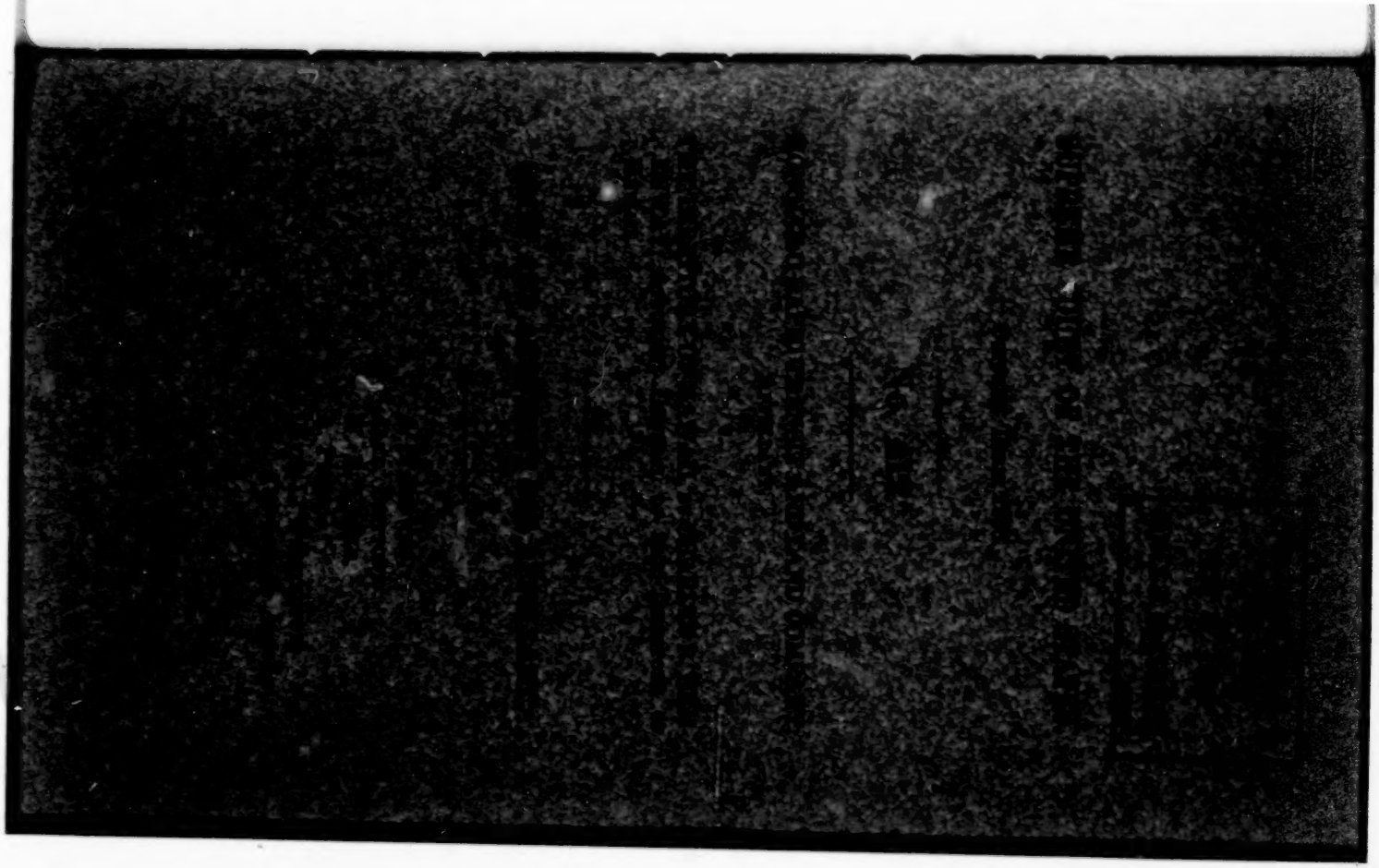

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 412.

HONOLULU RAPID TRANSIT AND LAND COMPANY, APPELLANT,

v.

THE TERRITORY OF HAWAII, BY CHARLES R. HEMENWAY, ATTORNEY GENERAL OF THE TERRITORY OF HAWAII.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement.

This is a proceeding in equity brought by the Territory of Hawaii, at the relation of its Attorney General, against the Honolulu Rapid Transit and Land Company, holding a franchise under acts 69 and 70 of the Session Laws of the Republic of Hawaii, 1898 (now compiled as chapter 66 of the Revised Laws of Hawaii), ratified and confirmed by the Organic Act, operating an electric railway and furnishing the only public transportation facilities within the district of Honolulu, seeking to regulate by injunction the schedule of car service to be furnished by the railroad company on Liliha street, a public street in Honolulu, and particularly to restrict the respondent from running its cars, during certain portions of the day, at less frequent intervals than ten

minutes each way. The various lines operated by the defendant are set out in a way generally correct and are shown on a map (Tr., p. 14). These lines are known as the "Liliha-Waialae" line, the "King Street" line, the "Punahou" line, the "Nuuanu Street" line, the "Manoa" line, the "Alakea Street" line, and the "Emma Street" line. With the exception of the Manoa line and that portion of the Liliha-Waialae line between River street and Koko Head avenue, they are operated on a ten-minute schedule. The Liliha-Waialae line runs on Liliha street to the corner of King, where it connects with the King Street line; thence along King, Hotel, Alapai, Beretania, and Alexander streets, where it again connects with the King Street line and also with the Punahou line at Pawaa Junction; thence along King street and King street extended and the Waialae Road to a terminus at Koko Head avenue. The line also connects with the Punahou and Nuuanu lines at Fort and Hotel streets, and with the Alakea street line at Hotel and Alakea streets. Upon this line cars are operated on a ten-minute schedule on Wyllie street as far as River street, and on the rest of the line on a twenty-minute schedule.

It is alleged that the convenience of the public requires a ten-minute schedule, as now maintained, and that the company, "in violation of the rights of the public and its duties under the law and the requirements of its charter, threatens and proposes to forthwith modify the schedule of the said 'Liliha-Waialae,' to the end that the said cars so operated over and along said Liliha street between the hours of nine o'clock in the morning and four o'clock in the afternoon and between the hours of six o'clock in the afternoon and twelve o'clock midnight will operate under a twenty-minute schedule."

A temporary injunction issued.

The Company answered, denying the jurisdiction of the court and setting up that the complaint did not show any cause which warranted the exercise of its equitable jurisdiction; that the Territory was not a proper party nor had au-

thorized the proceeding; that the Company was exercising its right under and by virtue of section 73 of the Organic Act and the approval of the President in pursuance thereof, given on the 25th day of June, 1900; denying that public convenience requires the ten-minute schedule all day long, and alleging "that, in the endeavor to improve the service on the said Liliha-Waialae line, it purposed to make said service a continuous fifteen-minute service from Waialae through to Liliha street, but that after a conference between the officials of said Company and Messrs. George R. Carter, F. T. P. Waterhouse, and L. L. McCandless, representing the patrons along the Liliha Street end of the line, and Messrs. E. A. Berndt, W. L. Howard, and W. M. Minton, representing the Waialae portion of said route, and after a thorough canvass of the situation and a discussion of all the facts in regard to the necessities of travel at each end and the convenience of the general public, it was unanimously agreed and at the unanimous recommendations of said committees this Company consented to change its plan and to modify the schedule of said Liliha-Waialae line substantially as alleged in the bill of complaint, and was proceeding to carry said change into execution at the time of the service of this injunction, and that said proposed service is all that the exigencies of the travel along said line and the accommodation of the patrons of the road demand, with a view to the economical operation of said system, and is an ample service under all the conditions" (Tr., pp. 7-8).

We have printed as an appendix the material parts of act 69 of the Session Laws of the Republic of Hawaii, 1898, and those provisions of the Organic Act which are pertinent to the case. It will be observed that the duties of the Executive Council are cast upon the Governor, and those of the Minister of the Interior on the Superintendent of Public Works, and to make this clear we have given also the sections of the Revised Laws of Hawaii compiling this act, in order to show the changes made by the Organic Act in these sections.

A permanent injunction issued, which, omitting the formal part, is as follows:

> "And it appearing that the said respondent on the 7th day of September, A. D. 1907, and since, maintained and operated, and now maintains and operates, each and every day, between the hours of 5:45 a. m. and 11:42 p. m., over and along Liliha street, within the district of Honolulu, county of Oahu, cars for the carriage of passengers, both ways, with the exception in respect to the first car up or northerly, and the last car down or southerly when only one way, at intervals of not more than ten minutes;
>
> "And it also appearing that the public convenience requires the number of cars now and so operated by the said respondent over and along the said Liliha street, during the said times, and that a less number of cars for the carriage of passengers over and along said Liliha street is insufficient to meet the requirements of public convenience;
>
> "It is hereby ordered, adjudged and decreed that the respondent, the Honolulu Rapid Transit and Land Company, be, and it is hereby perpetually enjoined from operating over and along Liliha street, within the district of Honolulu, county of Oahu, cars for the carriage of passengers insufficient in number to meet the public convenience and from reducing the number of cars for the carriage of passengers from the number now operated and maintained by it over and along said Liliha street daily, between the hours of 5:45 a. m. and 11:42 p. m., to wit: one car every ten minutes, both ways, with the exception in respect to the first car up or northerly and the last car down or southerly when only one way" (Tr., p. 15).

The Railroad Company appealed to the Supreme Court of Hawaii, which affirmed the decree (Tr., pp. 30, 31), and an appeal was taken to this court.

After expressing its dissent a second time from the rule laid down by this court in Bierce *v.* Hutchins, 205 U. S., 340, requiring a statement of the facts, but constrained by that decision, the court finds the following facts:

"(1) The Honolulu Rapid Transit & Land Co. is a corporation organized in pursuance of and possessing a franchise granted by act 69 of the Republic of Hawaii July 7, 1898, the franchise having been approved by the President of the United States June 25, 1900, in accordance with the provisions of Sec. 73 of the Organic Act of the Territory of Hawaii of April 30, 1900.

"(2) Said Company operates a single track street railway system in Honolulu and among other lines of said system one known as the Liliha St.-Waialae line. The line on Liliha street was part of the first line operated by the Company and has been operated as parts of various lines from and after September 1, 1901, and during all that time a ten-minute service has been given on that street.

"(3) In 1904 the car service of the Company was extended to Waialae, a suburb on the east side of Honolulu, the Waialae cars first running on a thirty-minute schedule to and from Pawaa junction.

"(4) Since the latter part of 1905 a car has been run every twenty minutes during the day from the junction of Wyllie street and Liliha street to the terminus at Waialae, the line passing through the business portion of Honolulu of which the center is Fort street, while the alternate cars constituting the ten-minute service on Liliha street stopped at River street. Connections were made at the foot of Liliha street with the ten-minute service on the King street line and the bulk of the travel transferred at this point to and from the King Street line which is the longest and most important line of the Company.

"(5) The population of Honolulu is about 40,000.

"(6) The map of Honolulu in evidence, showing the street car system, may be referred to as part of these findings.

"(7) The company proposed to change the service so as to give, with the same number of cars, a fifteen-minute service throughout the Liliha St.-Waialae line and procured permission from the superintendent of public works to change its switches so as to give this service. Objection was made by some of its patrons. After conferences with a committee which urged a ten-minute service throughout the line the Company

agreed that a compromise service would be given of twenty minutes during the entire day and ten minutes from 5:45 a. m. until 9 a. m. and from 4 p. m. to 6 p. m. The Company applied to the superintendent of public works for permission to install the necessary switches so as to give this service. This suit was brought by the Attorney General at the request of dissatisfied residents of the district served by the Liliha Street line.

"(8) The evidence showed that public convenience required the continuance of a ten-minute service on Liliha street.

"The court is of the opinion that the eighth finding is a finding of fact, but upon the appellant's contention that it is a mixed question of law and fact and its insistence that its rights in the Supreme Court of the United States would be prejudiced should the Supreme Court take its view of the matter, and there should be in the record no findings of fact upon which said eighth finding was based, the court makes the following findings of the principal evidential facts leading to its eighth finding:

"(8*a*) A ten-minute service on Liliha street has been continuously maintained since the beginning of the operation of the street railway system by the Company in Honolulu, to wit, since about September, 1901.

"(8*b*) During that period there has been a steady increase in the population of the district served by the Liliha street line.

"(8*c*) Property in the section served by the Liliha Street line has been purchased and houses built in reliance upon a ten-minute service.

"(8*d*) There is a definite prospect of further increase in the population of the district served by the Liliha Street line owing to a recent sale of homestead lots at Alewa by the government.

"(8*e*) There was testimony of individual patrons tending to show that public inconvenience would result from the proposed change.

"(8*f*) The entire system of the company is operated at a profit.

"(8*g*) The evidence did not show either that the

Liliha Street line or the Liliha St.-Waialae line was operated at a loss.

"(8*h*) The remainder of the defendant system except the two outlying districts of Manoa and Waialae is operated upon a ten-minute service" (Tr., pp. 29, 30).

The appellant relies on all the errors assigned (Tr., pp. 32, 33, 34), and these errors raise, as questions of law:

1. Whether equity has any jurisdiction of the subject-matter of the action, and, incidental to this, whether (*a*) mandamus is not the only remedy to enforce a statutory obligation of the character alleged; (*b*) an injunction regulating car schedules or the operation of a street railway is not an unknown method of equitable interposition; (*c*) under the franchise (section 36), the only proceeding which can be instituted is by the Superintendent of Public Works, with the consent of the Governor; (*d*) whether section 7 imposes any clear duty to run the cars at any particular time, such as could be enforced either by injunction or mandamus.

2. That the franchise reserved the power of control of the discretion of the corporation in regulating the operation of its railway and fixing its schedule and the time of running its cars—(*a*) particularly by section 9, to the Governor of the Territory of Hawaii or the Superintendent with the approval of the Governor, or if not reserved by said section 9, then (*b*) said power is reserved to the control and discretion of the legislature alone, and the court has no power to exercise it.

3. That no injunction could be issued in this case, because premature, in that the proposed schedule could not be carried out until permission had been granted by the Superintendent of Public Works, which had not been done.

Although we shall argue these questions in the order which we have presented them, the question of transcendent im-

portance to the Territory and Railroad is whether the reserved power of control is in the Governor and the Superintendent of Public Works, subject to his approval, and for this reason the court has no power, at the request of private individuals, or of the Attorney General, at their solicitation, to interfere.

ARGUMENT.

I.

EQUITY HAS NO JURISDICTION.

(*a*) *Mandamus and not injunction is the remedy to enforce a statutory obligation.*

Under the laws of Hawaii, remedy by mandamus is ample. Revised Laws of Hawaii, sections 2010, 2015, 2021.

In discussing the Federal cases it must be remembered that there is, apart from these cases wherein statutes have granted the writ, no original writ of mandate in the Federal courts, jurisdiction being confined to process in aid of their own decrees. But there is some authority in this court upon the point. Thus, in aid of a judgment at law for a sum of money against a municipal corporation, it was held that the appropriate remedy was by writ of mandamus from the court in which the judgment was rendered, Mr. Justice Nelson, delivering the opinion, saying:

> "The writ affords a full and adequate remedy at law. There are numerous recent cases in this court on the subject.
>
> "We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus. An injunction is generally a preventive, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases where

it is used by the court to carry into effect its own decrees—as in putting the purchaser under a decree of foreclosure of a mortgage into the possession of the premises. Even the exercise of power to this extent was doubted till the case of *Kershaw v. Thompson*, in which the learned chancellor, after an examination of the cases in England on the subject, came to the conclusion he possessed it; not, however, by the writ of injunction, but by the writ of assistance."

Walkley v. City of Muscatine, 6 Wall., 481, 482-3.

The objection of want of equity was also raised in another case, where the Pullman Company sought to enforce an agreement to haul its cars, but the court did not consider the point, as the demurrer was properly sustained upon other grounds.

Pullman Palace Car Co. v. Mo. Pac. Co., 115 U. S., 587.

The same rule was laid down in a subsequent case, in which not only a *mandamus* but an *alias* and *pluries* had been issued without effect, the court holding that the Federal court sitting in equity had no jurisdiction. After citing *Supervisors v. Rogers*, 7 Wall., 175, that under statutory authority this could be done, the court said (p. 121):

"But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and

> limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law."

And continued:

> "Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law, and there be well disposed of.
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> "A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels."
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> *Rees v. City of Watertown*, 19 Wall., 107.

In the only case in which the power to issue a mandatory injunction at all similar in character has been recognized by this court, the question did not come directly before it, but arose upon a writ of *habeas corpus* by an employee of a railroad who had disobeyed an injunction obtained under section 3 of the Interstate Commerce Act, making it the duty of every common carrier to "afford all reasonable, proper and equal facilities for the interchange of traffic and to receive, forward and deliver freight cars in the ordinary transaction of business without any discrimination," the bill alleging a combination of the locomotive engineers in the employ of the defendant company who refused to handle cars to be interchanged with the complainant's road, and that the effect of this interference would be destructive of a large and important part of its business, this court saying that although the injunction might be termed mandatory, its object was to continue the existing state of things, "and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a

contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it."

In re Lennon, 166 U. S., 556.

It will be observed in this case that the injunction was one restraining the interference with existing business relations, with a property right, a contractual relation secured by an act of Congress, and did not direct any specific method of exercising the right; that the question which arose was not whether the injunction had properly issued, but whether the court had, under any circumstances, jurisdiction of the subject-matter.

Our research has found no case to sustain equitable jurisdiction to regulate the exercise of a public franchise by compelling affirmative action, and none is cited by the Hawaiian court. The case cited by it to the point that "injunctions are common which in effect require that nothing be done to disturb existing rights or conditions" arose under an act of Congress fixing charges for telephone service, the bill alleging that the plaintiffs had a contract for the service; that they desired to continue the same, and had tendered the amount required by the act of Congress, but that the defendant threatened to remove the telephone and to discontinue its service. Here, again, as *In re Lennon*, the right of property—a contractual right—is involved. The injunction sought was to prevent the removal of the telephone, *and the rate had been fixed by Congress*. No question was made in the cause as to the jurisdiction of a court in equity, the point involved being the validity and the interpretation of the act of Congress.

Chesapeake & Potomac Ry. Co. v. Manning, 186 U. S., 238.

Let us cite some of the decisions in other courts which we cited below. Thus:

> "Where the breach is of a mere statute duty, an action is not the appropriate remedy. It has been

held that when the duty to build a railroad was imperative by the act authorizing it, that it could not be enforced by injunction at the suit of the attorney general (*Attorney General v. Birmingham, etc., Ry. Co.*, 7 Eng. Law & Eq., 283). There are various duties charged upon companies by the Railroad Act, such as maintaining fences or farm crossings. In such cases an action by the attorney general for specific performance would be without a precedent. The only admissible remedies, it seems to me, for a breach of the duties charged on corporations by the Railroad Act are *mandamus*, or *quo warranto*, or indictment."

People v. Albany & Vermont R. Co., 24 N. Y., 261.

"In the absence of any express grant of equity jurisdiction in the premises, it would seem that no relief could be afforded in equity for the cause stated in the petition, either at the suit of individuals, or of the attorney general representing the Commonwealth; but that the only remedy would be at law by *mandamus* indictment, or other appropriate process, or by proceedings to annul the respondent's charter or franchise (*Attorney General v. Birmingham & Oxford Junction Railway Co.*, 4 De Gex & Smale, 490, and 3 Macn. & Gord., 453; *People v. Albany & Vermont Railroad Co.*, 24 N. Y., 261)."

Shackley v. Eastern Railroad Co., 98 Mass., 93.

Many of the cases are considered and the matter ably discussed in a West Virginia case, where the true rule is laid down that in regard to a public-service corporation occupying the street, in order to justify the interposition of equity, as distinguished from mandamus, to enjoin or to direct the doing of particular acts, a nuisance of a permanent character or some other equitable ground must be shown, the court distinguishing many cases on the ground that "merely private rights were involved, and mandamus would not lie, whereas here it is sought to compel a chartered corporation to perform

a duty to the public, and mandamus lies." Attached to this case is a valuable note.

Moundsville v. Ohio River R. R. Co., 37 W. Va., 92; 20 L. R. A., 161.

To this array of authority the Hawaiian court gives but one answer:

> "It is unnecessary to comment upon these cases further than to observe that they merely illustrate the rule that equity does not act when there is adequate legal remedy, that its compulsory powers will not be exercised when mandamus will accomplish the same purpose, and that in the absence of a contractual obligation to construct and operate a railroad mandamus will not lie to compel its construction and operation" (Tr., p. 22).

This answer, when analyzed, admits the proposition, because the franchise, when accepted by the appellant, became a contract between the Territory and the Honolulu Rapid Transit and Land Company, as is conceded in the pending cases of *Honolulu Rapid Transit & Land Company v. Holt*. Indeed, the franchise provides (see Appendix, sec. 4, par. 7) that the construction must be commenced within one year, and "at least ten miles must be completed, equipped and ready for the transportation of passengers within two years," for which a bond is provided, and that the remainder must be completed, equipped, and ready for transportation of passengers within four years. By section 7, which we shall hereafter discuss, the association "shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require"; and by section 9, paragraph 4, rules and regulations for the operation as well as the maintenance of the road are to be made, with the consent and approval of the Governor, and in default of the association making such rules the Superintendent of Public Works, with the consent of the Governor, may

make them, and the Governor can at any time change these rules.

The court itself, further on in the opinion, recognizes this when it declares (Tr., p. 24) "the injunction in this case merely precludes the violation of an obligation imposed by the defendant's charter." There was, then, a legal obligation imposed by the defendant's charter which the court, in a subsequent portion of its opinion, holds as "sufficiently specific" to be enforced (Tr., p. 25), and we respectfully suggest to this court that there is nothing in the cases which are cited which distinguishes between a legal obligation imposed by the charter sufficiently specific to be enforced and a legal obligation imposed by a public contract, arising from the charter, with respect to the right to a writ of mandamus. That a railway company may be compelled by mandamus to perform its public duties specifically and plainly imposed by the franchise, and even to operate its road, has been held so many times that it seems to be unnecessary to cite further cases.

State v. Dodge City Ry. Co., 53 Kas., 329; 24 L. R. A., 564, and note.

State v. Bridgeton, &c., Co., 62 N. J. L., 592; 45 L. R. A., 837, and note.

State v. Hartford & N. H. R. R. Co., 29 Conn., 583.

State v. Helena Power & Light Co., 22 Mont., 391; 44 L. R. A., 692.

San Antonio Street Ry. v. State, 90 Tex., 520.

And it has been recognized by this court:

> "It may well be that the scope of the plaintiff's case includes the claim that the railway company having, on the faith of the alleged agreements, made a location of its line, exhausted its corporate power in reference to its establishment; or that, even if it still had corporate discretion to change it, the circumstances alleged, including the agreements made on condition of its original location, *may not have created a corpo-*

rate duty enforceable by mandamus, to maintain and permanently operate it."

Chicago & N. W. Railway v. Crane, 113 U. S., 424, 434.

In an earlier case, where Congress had conferred on the circuit courts, by the act of Congress of March 3, 1873 (17 Stats., 509, section 4) jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law, the right of the Attorney General to maintain mandamus is assumed, and many cases are cited, and the proposition sustained—

> "that private persons may move for a *mandamus* to enforce a public duty, not due to the Government as such, without the intervention of the Government law officer."
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> *Union Pacific R. R. Co. v. Hall et al.*, 91 U. S., 343, 355.

It is to be observed that this case puts the right to maintain a bill in equity under some circumstances upon the existence of a public nuisance.

Indeed, the only cases in which equity has been successfully appealed to are cases in which there was a private contract and not a public right.

Union Pacific R. R. Co. v. C., R. I. & P. R. R. Co., 163 U. S., 564.

Southern Ry. Co. v. Franklin & P. R. Co., 96 Va., 563; 45 L. R. A., 297.

(b) No ground for equitable relief.

Whether a mandatory injunction can be obtained in Hawaii or not, its decisions show that equity will not interfere with the management of corporations or grant injunctions, except in clear cases and as a preventive measure against action which is likely to cause irreparable injury.

Brown v. Carter, 15 Haw., 333, 350.

Wundenberg v. Markham, 14 Haw., 167.

This action seeks to enforce a public right by the aid of an injunction, which is only done in a proper case for specific performance within the rules of equitable cognizance. In some cases of a negative covenant a threatened breach may be prevented where irreparable injury can be shown, and for the purpose of preventing that irreparable injury, but injunction cannot be used to enforce a contract unless the case is brought within the rules authorizing specific enforcement. The remedy is by mandamus, if the duty is specific; by *quo warranto*, if not.

Waianae Co. v. Bell Telephone Co., 6 Haw., 589.

An injunction does not lie to enforce a contract requiring continuous acts.

Pomeroy's Equity Jurisprudence, vol. 6., p. 76, and cases cited.

The remedy in such a case is by mandamus or by proceedings in the name of the State for a forfeiture of the charter. A bill in chancery will not lie to enforce the specific performance of duties requiring continuous personal labor and care.

McCann v. South Nashville Ry., 2 Tenn. Chan., 773.

Marble vs. Ripley 11 Wall 358

But we think this point concluded by a decision in this court, which is amply sustained by other authority which we will cite, which also incidentally determines some of the questions which we have already argued.

The statute incorporating the Northern Pacific Railroad Company authorized it to construct and maintain its railroad, and by section 5 of its charter it was enacted—

> "That said Northern Pacific Railroad *shall be constructed* in a substantial and workmanlike manner, with all the *necessary* draws, culverts, bridges, viaducts, crossings, turnouts, *stations* and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with

> rails of the best quality, manufactured from American iron; and a uniform gauge shall be established throughout the entire length of the road."

The Supreme Court of Washington Territory, under this provision, sustained an application for mandamus in the name of the Territory to compel the Northern Pacific Railroad Company to continue the station and stop its trains at Yakima City, a county-seat and the most important business center on one of its branches; which decision was reversed by this court.

The opinion of Mr. Justice Gray establishes these propositions: That a writ of mandamus to compel a railroad corporation "to do a particular act in running its trains can be issued only when there is a specific legal duty on its part to do that act;" that when "the charter requires it to maintain a railroad as a continuous line, it may be compelled to do so by mandamus," citing *Union Pacific R. Co. v. Hall*, 91 U. S., 343, and *State v. Hartford & N. H. R. Co.*, 29 Conn., 538; that it cannot be compelled to maintain a road to a certain point if it is not remunerative, citing English cases, *Com. v. Fitchburg R. Co.*, 12 Gray, 180; *State v. Southern Minnesota R. Co.*, 18 Minn., 40; that "these matters are more proper to be determined by the directors, or, in case of the abuse of their discretion, by the legislature, or by administrative boards entrusted with that duty, than by the ordinary judicial tribunals." The case declares that the provision in section 5 that they shall construct "all necessary stations" is but a general expression of what would be implied by law and "cannot be construed as imposing any specific duty or as controlling the discretion" of the corporation. The opinion then reviews numerous cases, some hereafter cited, showing that a court of chancery is not clothed with legislative power; that the question whether a reasonable ground for interference with the discretion of the corporation is presented is for the legislature to determine, citing *R. R. Comm. v. Ry.*, 63 Me., 270, to show that in that case the power was

expressly given by statute to the railroad commissioners, and that the same rule had been applied in England; that the case of *State v. Republican Valley R. Co.*, 17 Neb., 647, is inconsistent with the decisions of this court and of the New York courts; that, although the Supreme Court of Illinois has gone farther than other courts, or the Supreme Court of the United States, in authorizing mandamus, that court has held that mandamus will not lie "to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company" (*Mobile & O. R. Co. v. People*, 132 Ill., 559; *People v. Chicago & A. R. Co.*, 130 Ill., 175); and concludes that the discretion of the directors should not be controlled, under this section, by mandamus "determining the number, place, and size of its stations."

Northern Pacific R. Co. v. Dustin, 142 U. S., 492:

This case covers every ground. Thus, it is determined that a statutory requirement to build "the necessary stations" is not sufficiently specific for enforcement by mandamus. Here a requirement to furnish "sufficient cars" is equally deficient in the required certainty for enforcement by mandamus, and much less by injunction. Again, in the case at bar, even more clearly than in the Washington case, the discretion as to running the road is left with the corporation. The control is with the Governor, for by the fourth subdivision of section 9 (see Appendix) "the said association and others shall make reasonable and just regulations with the consent and approval of the Executive Council (now the Governor) regarding the maintenance and operation of said railway on and through said streets and roads: * * * All rules and regulations may be changed from time to time as the public interests may demand, at the discretion of the Executive Council" (now the Governor). If there is any control given by the act, it is vested in the Governor; if it is not given, then it is vested in the legislative body or in the corporation.

Taking up the cases cited by Mr. Justice Gray. Mr. Justice Waite, in the Atchison, Topeka & Santa Fe case, where the constitution of Colorado and the laws under it gave ample and explicit powers and authority to cross, intersect, and connect with railroads, receive and carry passengers, to erect and maintain stations and other accommodations, with the right to cross or connect with any other road, held that this meant a physical connection, and that a connection of business would not be enforced by a court of equity. So in our case the obligation is to furnish the cars, not to run them on any particular time. The object of the connection was to interchange business; but the interchange of business could not be required, although the law authorized the physical connection. The object of furnishing sufficient cars for the public convenience is undoubtedly to have them run, but the act does not provide or attempt to dictate how they shall be run after they are provided; that is left to the discretion of the directors. Says Mr. Justice Waite:

> "Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power."
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> *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S., 667, 681, 682.

So, in another case cited, where the grievance was obvious, the Court of Appeals of New York says:

> "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station-house, nor the enlargement of one."
>
> *People v. New York, L. E. & W. R. Co.*, 104 N. Y., 58.

And so the Supreme Court of Massachusetts, in a similar case, say:

> "Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine; and their determination on this point must be conclusive."
>
> *Commonwealth v. Eastern R. Co.*, 103 Mass., 254.

The Fitchburg Railroad case cited went up on a demurrer to an answer in a *quo warranto* proceeding, under an act under which the Fitchburg Railroad had been empowered to purchase, construct, and maintain a branch railroad. The answer admitted the purchase of the road, and that it had been ready at all reasonable and convenient times to transport passengers and passenger cars; but that no regular train had been run for nearly a year on the branch lines, and that it had given notice that no such trains would be run, because the expenses of running the trains was greater than the amount received, without allowing any sum for profit upon the capital in the same or the use of such capital. At the trial it was argued that the corporation, having public rights, *must run the road for the public good, and, having started to run, were bound to continue.* The court held that without doubt the conferring of the power imposed the correlative duty of carrying passengers and freight at reasonable times and for a reasonable compensation, subject to the revision of the legislature; that there was no question of the existence of the duty, but its extent and qualifications; that the power to judge of what was necessary and reasonable was in the corporation, except where the legislature has expressly intervened, and say:

> "If it had been intended that the duty of running trains should be absolute, it would have been made definite. But the question at once arises, When and how often is this duty to be discharged? Is a train to

be run whenever a passenger shall desire to go; or are there to be fixed times, and, if so, how frequent?"

Com. v. Fitchburg Co., 12 Gray, 180.

So in the Illinois case quoted the court say:

"It is believed, however, no case can be found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled by *mandamus* to increase the number of trains on its road, or to run daily a particular number of trains over its road, and we are satisfied there is no common-law authority for making such an order. Of course, where the charter of the company expressly requires that not less than a given number of trains shall be run daily, the company may be compelled by *mandamus* to perform this, like any other specified duty enjoined by its charter, or by other statutory provision."

Ohio & Mississippi Railway Co. v. People, 120 Ill., 200; 11 N. E., 347.

Other cases beside those cited by Judge Gray sustain the decision in the Northern Pacific case. Even a railroad commission may not order a railroad company to locate a station, unless there is express statutory authority.

"While the corporation is quasi-public in its character, and owes duties to the citizens which the courts can and will, under appropriate remedies, compel it to respect, yet the location of stations and the building of depots are not within such duties when not imposed by legislation."

Nashville, C. & St. L. Ry. Co. v. State, 137 Ala., 443; 34 So., 401.

"An examination of the cases bearing on this question discloses that no such duty exists, unless imposed by the charter of the defendant, or by a statutory regulation, or by some other legislative authorization con-

ferring the powers upon a railroad commission to impose the duty."

Page v. L. & N. R. R. Co., 129 Ala., 237; 29 So., 676.

State v. Helena Power & Light Co., 22 Mon., 391; 56 Pac., 685; 44 L. R. A., 692.

Mount Pleasant Cemetery Co. v. Patterson, etc., Ry. Co., 43 N. J. L., 505.

Florida Ry. Co. v. State, 31 Fla., 452; 13 So., 103.

State v. Kansas City Ry. Co., 51 La. Ann., 209; 25 So., 130.

Jones v. Newport News & M. V. Co., 65 Fed., 736.

San Antonio Street Ry. Co. v. State, 90 Tex., 525; 39 S. E., 926; 35 L. R. A., 662.

People v. Long Island Ry. Co., 39 Hun., 125.

Minnesota v. Southern Minnesota R. R. Co., 18 Minn., 40.

In a recent case in the Court of Appeals in New York, where the statute provided that "every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train, and shall take, transport, and discharge such passengers and property at, from, and to such places on the due payment of the fare or freight legally authorized therefor." Chief Justice Parker, after reciting this statute, continues:

> "Notwithstanding these provisions, according to the view adopted by the trial court, the discretion especially committed to the judgment of the board of directors of a railroad corporation may, upon the application of persons claiming to be aggrieved, be subjected to review by court and jury, and their determi-

> nation in the premises substituted for that of the directors. The supreme court of the United States and this court have decided, however, that a writ of mandamus to compel a railroad to do a particular act can be issued only when by statute there is a specific legal duty on its part to do that act, and clear proof of a breach of the duty (*Railroad Co. v. Dustin*, 142 U. S., 492, 12 Sup. Ct., 283; 35 L. Ed., 1092; *People v. New York, L. E. & W. R. Co.*, 104 N. Y., 58; 9 N. E., 856; 58 Am. Rep., 484)."

After quoting at length from the latter case, which holds that the legislature, and not the court, can alone interfere with the discretion of the directors, the court continues:

> "This case was cited with approval by the Supreme Court of the United States in the Dustin Case, *supra*. We agree, therefore, with the conclusion of the appellate division that mandamus will not lie in this case to compel defendant to operate its road in the same manner as it operated it prior to April 1, 1900, because the statute enjoins no such duty upon it, but instead submits the responsibility of determining how many trains shall be run, and at what intervals of time, to its board of directors."
>
> *People v. Brooklyn Heights R. Co.*, 172 N. Y., 95; 64 N. E., 788.

Wis. Ry. Co. v. Jacobson 179 U.S. 287

In the case cited, the jury found that public convenience required the operation of the road in the same manner as it had been previously operated. The court pointed out that there had been a mistake of remedy, the legislature having provided for redress in the railroad commissioners.

It is well settled that the power can be committed to a municipality or to boards within prescribed limits, and, in case of failure to comply with their orders, mandamus will lie.

> *Page v. L. & N. R. R. Co., ubi supra.*
>
> *Railroad Commissioners v. Portland, etc., R. R. Co.*, 63 Me., 269; 18 Am., 208.

Some of which cases are referred to by Mr. Justice Gray.

It is true, as we have already shown, that there are cases holding that a private contract may be so enforced; but the same rule does not apply in the case of "the violation of an obligation imposed by the defendant's charter" or "a violation of the statutory obligation of the defendant" (Opin., Tr., p. 24). Even if a mandatory injunction is permissible under the laws of Hawaii, the Wisconsin case cited by the court does not sustain the contention.

Of this case Mr. Hyde, in his work on Injunction, 4th ed., note, p. 32, says:

> "The case is believed to constitute the only precedent for the interference of equity to enforce by injunction, obedience to a penal statute, and it certainly extends the jurisdiction by injunction to a point unsustained by principle or authority."

But Chief Justice Ryan, in the case referred to, held that the statute was not a penal one, as the action was brought to prevent the railroads from charging rates in excess of those allowed by statute, and not to enforce rates which the statute authorized the railroad commissioners to fix, it being held that there was no penal provision applicable to the corporation in reference to the former, but only in reference to the latter. It is further held that the charter was a contract, and that the corporation could be restrained from using its powers for purposes not conferred by the act creating it. In other words, the court enjoined the railroads from doing an illegal act for which no penalty was provided. It prevented them from exacting rates when the legislature had exercised its judgment and declared that rates should not be charged in excess of given sums. The case did not involve the determination of rates, much less of schedules, and is not authority to the proposition that equity has jurisdiction to regulate rates, much less the making of time schedules.

(c) *Under section 36 of the franchise the Superintendent of Public Works, with the consent of the Governor, is alone authorized to institute proceedings.*

The section is comprehensive in scope, and covers every case where a corporation organized "for the purpose of constructing, *operating*, and maintaining" a railway "refuses to do, or fails to do, or perform, or carry out, or comply with any act, matter or thing requisite or required to be done under the provisions of this act."

This is a special remedy provided in a special act, comprehensive in its nature, to be set in motion by the officers specifically charged with duties in connection with this corporation and the exercise of this franchise.

We shall hereafter in this brief show how specific are the duties of the Superintendent of Public Works and of the Governor, and it is a natural construction, in accord with the clear intent and scope of the whole act, that the officers specifically charged with the duties of inspection and control should be the only officers authorized to initiate proceedings for a violation of its provisions. It is the Superintendent of Public Works who has the duty imposed upon him, either personally or by some officer appointed by him, to inspect the operation of the entire plant. The only case in which the Attorney-General is mentioned is in section 8—a violation of the speed ordinance—where suit may be brought by the Attorney General "or any other person to the use of the Territory."

We cite to this point:

Bond v. Merchants' Tel. Co., 5 Quebec Super., 415.
State v. Manchester Ry. Co., 62 N. H., 29.
State v. Mobile & Montgomery Ry. Co., 59 Ala., 321.
Anonymous, 2 Ld. Raymond, 989.
Antoni v. Greenhow, 107 U. S., 769.

(d) Section 7 imposes no such specific duty to run the cars on any particular schedule as can be enforced by either mandamus or injunction.

Under the next head in this argument we shall contend that section 7, read in connection with paragraph 4 of section 9, authorizes the appellant, with the consent and approval of the Governor, to make schedules, or, if the company fails to make them, then the Superintendent of Public Works, with the approval of the Governor, may make such, all of which may be changed, as the public interests require, at the discretion of the Executive.

We believe that this is the first occasion on which the State has contended, or any court has decided, that the control of the discretion of a railroad corporation on its train schedules is a matter primarily for the court rather than for the Legislative or the Executive Department. As a rule the railroad companies seek the court to revise legislative or executive action, and we admit that in this case the court has such revisory power where the action is confiscatory.

In fact, in our view the court's power goes farther; for instance, if the control of the Executive were exercised so as to deprive us of the financial return given us by the contract, in order to provide a service which, although desirable, was more than adequate for the public need, we contend that there are limits within which this discretion could be controlled by the courts, on the ground that the specific exercise was a violation of the letter and spirit of the contract.

But, confining ourselves to the section under consideration, it may be well to review the provisions of the act to ascertain the intent of the legislature.

It will be observed that in section 1, definitions are specifically given to "Executive Council" and "Minister of the Interior", as well as "said Association and others", indicating that the parties particularly in mind in drawing the contract contained in this franchise, who are, as it were, the actors in

the contract, are the Executive and the Superintendent of Public Works, as successor of the Minister of the Interior.

Section 2 grants the right to "maintain" and operate the railway, fixing its character, and defining the right of way.

Section 3 defines the motive power and for what it may be used.

Section 4, the method of construction. It provides, in paragraph 1, that the location shall be as directed by the Superintendent of Public Works; in paragraph 2, that the cars shall be approved by the Governor; that the style of rails and manner of laying them shall be approved by the Superintendent of Public Works; the bond for the construction is to be given to him; the guard rails and their size and location approved by him; the repair of the streets is to be approved by him, and finally concludes:

> "10th. All of the matters and things required by this section shall be subject to the approval of the Minister of the Interior."

Section 6 provides for the acquisition of the existing tramways companies.

Up to this time it will be observed that the provisions deal with the construction of the railroad, its substructure, its superstructure. Operation is only referred to in an incidental way, without making any provision for operation. The only provision in regard to equipment for operation is that already referred to, in subdivision 2 of section 4, which provides for the "construction" of passenger cars and how they shall be equipped.

But says the Hawaiian court of section 7:

> "The defendant's claim that its right to regulate the operations of its railway includes the right to determine for itself at what intervals its passenger cars shall be run is not tenable. The statute requires that it shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require (meaning, as we understand the statute, that the defendants

> *actually operate* and not merely, as it suggests, keep the cars in condition for using them), although 'other cars designed for the carriage of mails, parcels and goods' may be such as the association 'may deem necessary' " (Tr., p. 22).

Observing that our claim was not for an absolute right to regulate at what intervals cars should run, but that this right was subject to the approval of the Governor, and, incidentally, to the Superintendent of Public Works, as shown by the opinion (Tr., p. 24), the construction placed upon the section by the Supreme Court of Hawaii, if adopted, is not conclusive, for all that is claimed as to the meaning of the section is that the defendant shall actually operate a sufficient number of cars for passengers, as public convenience may require, and not that they shall operate them at any particular time or in any particular way. But it is of more importance to observe that the section deals with and employs the word "maintain" alone. When we consider the main question in this case under section 9 which uses both the words "operate" and "maintain," we shall show that the word "maintain" has a distinctive meaning apart from the word "operate"; that it means "to keep in effective condition, in working order, in repair." Reading the section, with the construction applied by the Hawaiian court, the Company "shall keep in working order as many cars to be used (for operation) for the carriage of passengers as public convenience requires," it is clear that the phrase "as public convenience may require" qualifies the phrase "maintain a sufficient number of cars" and not the phrase "to be used," and this construction is enforced by paragraph 2 of section 4, where the construction of such cars is provided for. Section 4 provides the method of construction. Section 7 determines the number of cars. This construction is re-enforced by the last paragraph of the section. The Company is bound by this to maintain a sufficient number of cars so that adequate service may be provided for the carriage of passengers, but for the carriage of mails, parcels and goods they may provide

such as they deem necessary. Nowhere is there any explicit provision, or the suggestion of any provision, that they shall be used on any particular part of the line or upon any particular schedule.

But we submit that the section is susceptible of a natural construction at variance with that put upon it by the Hawaiian court.

The only command in the section is that the corporation shall at all times "maintain" certain cars. Maintain is the only verb used in the section. That word does not mean to operate or to conduct or to run. It means, as we have shown, to keep on hand, to keep in an effective condition, in repair. There is nothing in the section to qualify this meaning of the verb or to make it necessary to depart from its ordinary acceptation. "Maintain" as used in the section has two objects, first, "a sufficient number of cars," and, second, "such other cars." No other grammatical construction is possible. The legislature having stated in a general way what it was that the corporation was required to maintain, proceeded to describe those objects more fully, and did so by describing the first set of objects, "a sufficient number of cars" as cars of a kind "to be used" ("suitable for use"), first, "upon said railway," second, "for the carriage of passengers," and described the second set as cars of a kind "designed for the carriage of mails, parcels and goods." Having described the nature of the cars, the legislature declares how many of each of the two classes should be kept on hand, by saying that the first class should be a sufficient number "as public convenience may require," and the second class such in number "as they may deem necessary." The words "as public convenience may require" are placed in the same position relatively to the words "a sufficient number" as the words "as they may deem necessary" are placed relatively to the words "such other."

The emphasis in the section is on the duty to maintain, to keep on hand. The section is one relative to maintenance and equipment and not to operation. In the minds of the

legislature in adopting it there is no apparent attempt to regulate the method or frequency of using the cars. The words "to be used" are a mere adjective phrase intended to describe the kind of cars and the phrase "to be used upon said railway for the carriage of passengers" may be regarded as though it were written in a parenthesis, as may also the phrase "designed for the carriage of mails, parcels and goods." The words "to be used" were intended to be the equivalent of the word "designed" for use, or of the words "suitable for use."

By the section, the legislature intended, it is submitted, to designate the number, and that not a certain or specific number, of each of two kinds of cars which the corporation was required to keep on hand at all times. One kind of cars was that designed for the carriage of mails, parcels and goods, and of those, since this was intended primarily as a passenger railway and not as a freight-hauling institution, the number was to be such as the corporation itself in its sole discretion might desire and determine to have. The other kind of cars was that suitable for use for the carriage of passengers. As to these the legislature was not willing to leave it solely to the Company to determine how many should be kept, and, therefore, prescribed that sufficient should be kept at all times to meet the requirements of public convenience.

II.

THE FRANCHISE RESERVES THE POWER OF CONTROLLING THE DISCRETION OF THE APPELLANT IN REGARD TO REGULATIONS CONCERNING THE OPERATION OF THE RAILROAD TO THE GOVERNOR.

Rates of Speed and Fares Subject to Executive Control.

The supervisory care shown up to section 7 is continued in the following sections. Thus section 8 in reference to speed, incorporated in the Revised Laws as section 842, has

been amended (Act 78, Laws of 1905), and by the amendment "the discretion to name a maximum rate of speed, within the limitations laid down, at which cars may be operated, is left with the Superintendent of Public Works, with the approval of the Governor." As a time schedule is dependent on the number of cars to be operated and the rate of speed, it is clearly inconsistent to place the control of the schedule with one branch of the government—the courts—and the control of the rate of speed with another branch—the Executive. This is a legislative declaration of the understanding of the Territory in reference to the spirit and scope of the franchise.

Again, in section 9, provision is made by the second subdivision for rates of fare, without the limits prescribed in the first subdivision, and these fares are to be fixed by the company, subject to the approval of the Governor.

Operation, Including Time Schedule, Subject to Executive Control by Section 9, Paragraph 4.

In section 9, by paragraphs 1, 2, and 3, the rates of fares and transfers—clearly a matter of operation—are provided for; while paragraph 4 provides:

> "4th. The said association and others shall make reasonable and just regulations with the consent and approval of the Executive Council regarding the maintenance and operation of said railway on and through said streets and roads; and the said association and others failing to make such rules and regulations, the Minister of the Interior, with the approval of the Executive Council, may make them. All rules and regulations may be changed from time to time as the public interests may demand at the discretion of the Executive Council."

The remainder of this section provides who shall be entitled to free passage and a penalty for exacting excessive fares.

Definition of Maintenance and Operation.

It will be observed that while section 7 uses the word "maintain" alone, this section provides for the "maintenance and operation of said railway." It is necessary then to determine the meaning of the words "maintenance" and "operation," as the reasonable and just regulations which the Company can make, with the approval of the Governor, are regarding maintenance and operation.

"Maintenance" is defined as follows:

> "The act of maintaining; keeping up; * * * preservation" (Century Dictionary).
>
> "(3) The action of keeping in effective condition, or working order, in repair, etc." (Murray's New English Dictionary).
>
> "Maintain—to hold in an existing state or condition" (Century).
>
> "Operation—(1) Action; working; (4) The state of being at work; systematic action; as the machine is in operation" (Century). (10) The action of operating or working a machine, engine, railway, business, etc. See operate" (Murray).

"Operate" is defined:

> "(7) To direct the working of; to manage; conduct; work (a railway business, etc., chiefly U. S.)"—Murray.
>
> "II. 2. To direct or operate the moving of; cause to move or perform the act desired; work; as to operate a machine."

These definitions have been sustained by the courts.

Thus this court, reviewing the Iowa cases, which confine the words "use and operation of the railway" to the moving and operation of trains, cars and trucks, held that—

> "The railway was being used and operated in the movement of the hand-car, quite as much as if the latter had been a train of cars drawn by a locomotive"

the point being that the operation of a railroad primarily meant the movement of its means of transportation.

C. M. & St. P. Railway v. Artery, 137 U. S., 507, 515.

That it is the American use, as pointed out by Murray, which is to be followed, was declared by an Indiana case, in which it was held to be "running or managing a railroad" (*Rhodes v. Matthews*, 67 Ind., 131). So, "operate their railroad" has been held equivalent to "running their cars" (*Cumming v. Brooklyn City Ry. Co.*, 104 N. Y., 669). The word "operation" is equivalent to "running its engines and cars on its line" (*C. K. & W. Ry. v. Totten*, 1 Kan. App., 558). A broader meaning has been given in Massachusetts and Pennsylvania. In the former "handling of freight" has been held to be an operation of a railway (*Daley v. B. & A. Ry. Co.*, 147 Mass., 101). In the latter it has been held to include every kind of ordinary use, but not construction or equipment (*App. of Llewellyn*, 103 Pa., 458).

It will be observed that the controversy has been whether anything but the movement of trains was included in the term "operation." It would seem as if when the corporation was given discretion to make reasonable and just regulation for the operation of its railroad that the primary thing which would be determined would be the running of its cars; the frequency of the service.

Sections 7 and 9 should be construed together, and so construed, the power to control the discretion as to the operation is given to the Executive.

The legislature will not be presumed to have enacted in sections 7 and 9 inconsistent provisions unless the language used leaves no alternative. Under the construction we contend for, the two sections are entirely consistent, are in the natural form and order and supplement each other. It is only by giving to the words "maintain" and "operate" a strained, unusual meaning that any apparent conflict be-

tween the two sections arises. Taking the words in each section in their ordinary acceptation the statute is clear and consistent.

Assuming, however, that the words in section 7 "as public convenience may require" were not inserted to determine the number of passenger cars to be maintained, but constitute a positive mandate that the cars of the Company must be operated with the frequency in their trips that public convenience requires, the same result contended for by the appellant follows, for if this mandate is to be found in the words of that section, then it is as though the statute read—whether all in one section or partly in one section and partly in another is immaterial—"the cars of the Company upon the said railway shall be operated as to frequency of trips as the public convenience may require and in accordance with such reasonable and just regulations as the Company may make, with the consent and approval of the Governor, or failing such action by the Company, in accordance with such reasonable and just regulations as the Superintendent of Public Works with the approval of the Governor may make." In other words, the statute under such construction would prescribe, first, that the cars should be operated as to frequency of trips as public convenience may require, and then would further prescribe that just what frequency of trips, upon any particular part of the Company's lines, or at any particular hours of the day or in any particular month or any particular year would fulfill the general requirements of public convenience, was a matter to be determined by regulation of the Company in its just discretion, subject only to the approval of the Governor, or, failing action by the Company, by regulation of the Superintendent of Public Works, with the approval of the Governor. The general object would be prescribed in section 7. The regulation of attaining that general object would be left by section 9 to the discretion of the Company or the Superintendent, with the approval of the Governor. Such statutes are to be found elsewhere. See

People v. Detroit City Railway, 116 Mich., 132, and *Mayor v. Drydock Company*, 133 N. Y., 104. In Michigan the Common Council, under general authority of the statute, passed an ordinance that "the cars on all lines subject to this ordinance shall be operated as the public convenience may require and the Common Council order", and subsequently passed an order that the railway company "provide sufficient cars upon G avenue so that a six-minute service shall be given upon said avenue between Mack and Sheridan avenues, between the hours of 5:30 a. m. and 10 p. m." The courts reviewed the order to the extent of determining whether or not it was reasonable, the result reached being that it was reasonable, but no doubt was anywhere expressed in the opinion above cited (116 Mich., 132), and it seemed to be assumed by all concerned, that the matter of the frequency of service and of the running of the cars was a part of the "operation" of the cars and that it was proper for the Common Council to fix the time schedule.

So also in the New York case cited, the act authorizing the construction of the railway in section 2 provided that "said railroad shall be constructed on the most approved plan for the construction of said railroads and shall be run as often as the convenience of passengers may require and shall be subject to such reasonable rules and regulations in respect thereto as the Common Council of the City of New York may from time to time by ordinance prescribe." Under this authority the Common Council passed an ordinance requiring the street surface railroad companies to operate their roads "as frequently as public convenience may require and not less than one car every twenty minutes between the hours of 12 midnight and 6 o'clock a. m. each and every day both ways for the transportation of passengers." As in the Michigan case, the court merely considered the question of whether or not the regulation was reasonable. Nothing was said about the authority of the City Council to fix the time schedule, nor was it suggested that the inclusion in the

statute of the mandate that the railroad "shall be run as often as the convenience of passengers may require" left it any the less in the power of the City Council to prescribe reasonable rules and regulations including time schedules for the running of the cars. Presumably counsel on both sides, as well as the court, regarded the existence of the latter authority in the council as too clear for successful attack.

Power Naturally Lodged with Executive.

The power of regulation of car schedules is naturally and properly for the Company, with the approval of the Executive rather than the Judicial Department of the Government.

It is submitted with all respect to that tribunal that the Supreme Court of Hawaii is unduly alarmed at the thought of having this power vested with Executive officers of the Government. That court says:

> "A grant either to the Company or to the Executive of such an important power as to determine how many cars are required for this purpose would naturally and properly be expressed or clearly implied. Its exercise would not call for any public hearing but ordinarily would be *ex parte* on the Company's showing. A matter so important to the public is subject to judicial inquiry and determination unless, as is not the case here, shown in clear language to be entrusted to Executive discretion or to the discretion of the corporation" (Tr., p. 24).

It seems to us it was a natural course for the Legislature to give to the Executive and Administrative and not to the Judicial Department the supervision of an administrative matter, such as the arrangement of the time schedules of the cars of the Company and other details of the operation of its railway. Such a power is usually vested in that department for various reasons. In the first place, judges are chosen because they are learned in the law and not because they are peculiarly fitted to supervise the operation of street railways or to in any

other respect carry out in detail general provisions of the laws. The Superintendent of Public Works, on the other hand, is ordinarily chosen because of his experience and training as a civil engineer and his special qualifications to administer the laws concerning streets, railways and other public or semi-public works. The Governor, too, may well be presumed to be a man of broad experience in these and other similar matters, and certainly the directors of a street railway corporation may well be expected to possess or have easily available technical knowledge concerning the details of the operation of their railway system. Again, an Executive officer is in a better position ordinarily to ascertain and keep familiar with the requirements of public convenience in such matters as the running of a street railway operated within his jurisdiction and incidentally of the frequency of trips necessary to meet the requirements of public convenience. Section 33 provides that: "the entire plant, operation, books and accounts of said association and others shall from time to time be subject to the inspection of the Superintendent of Public Works or other officer appointed by him for the purpose." The members of a court do not ordinarily go out and see for themselves at first hand what the facts are in any given case. They await in the court rooms the presentation of the facts as claimed by the parties to a controversy as well as their contentions as to the law; while an Executive official charged with such a duty ordinarily and properly views the ground himself and at times from day to day makes observations of conditions, and this, too, before ever any one in interest comes in with a complaint or petition for action. Then when the complaint or petition is made he seeks either on the spot or otherwise such further information, if any, as is available. He acts speedily and with much less expense to the parties, who may appear without counsel. If he acts erroneously he can the more readily and with less formality give a further hearing to the parties and, whether with or without such hearing, readjust the schedules or otherwise correct the errors which he has made.

Shown by the Situation Resulting from the Injunction.

A significant illustration of the propriety of leaving such matters to the Executive Department and of the impropriety or inconvenience of placing them with a judicial tribunal, whether it be the Circuit Court or the Supreme Court, is to be found in this very case. The Supreme Court of the Territory has said to the respondent in substance: "We now order that you perpetually operate your cars on Liliha street on a ten-minute schedule." Let us assume that six months hence or a year hence conditions will have so radically changed on and near Liliha street that no reasonable man will say that public convenience requires or permits the maintenance on that street of a ten-minute schedule. What is the respondent to do in that event? He certainly cannot disobey the injunction. If he does he is guilty of contempt and liable to the ordinary penalties therefor. He must move for a modification of the injunction and he must move thereafter for further modifications from time to time at intervals, however frequent, when the conditions seem to require or warrant that course. Clearly neither the Circuit Court nor the Supreme Court were intended, either by the power creating those courts or by the Legislature of 1898, to be bothered with any such details concerning the operation of a street railway. On the other hand, there will be nothing either unexpected or unusual or inexpedient in having such frequent applications to the Governor or to the Superintendent of Public Works, as the case may be, for the modification of any existing schedule. In fact such modification from time to time was thought of by the framers of the statute and they therefore added in express words, "all rules and regulations may be changed from time to time as the public interests may demand at the discretion of the Governor."

Marble vs. Ripley ubi supra

"The difficulties in the way of issuing a mandamus to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter it

self are much increased when it is sought to compel the corporation to establish or to maintain a station, and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at or near, or within convenient access to one point or another, *which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the Legislature, or by administrative boards entrusted by the Legislature with that duty, than by the ordinary judicial tribunals.*"

Northern Pacific Co. v. Dustin, ubi supra.

No Municipality in Hawaii when Franchise Granted.

This power of fixing time schedules and of regulation of other details of the operation of street railways is oftentimes left with the common councils of cities. In addition to the Michigan and New York instances above referred to, see *State v. Helena Power and Light Company*, 22 Mont., 391, 393, and, for a general statement on the subject, Nellis on Street Surface Railroads, page 205. If the common council of a city may properly be vested with this power of regulation, why should not the Superintendent of Public Works of a Territory and the Governor of the Territory receive such power? What cause for apprehension is there that if so entrusted either or both of the latter officials will not properly safeguard the interests of the public? In 1898, when act 69, granting the franchise to the respondent, was passed, there was no city government and no city council in this Territory. No law creating a city government is in force in Hawaii today, and the closest approach to it, that creating government by counties and a board of supervisors for each county, did not go into effect until 1905.

Whatever may be the ordinary practice elsewhere, it is not at all surprising that in Hawaii this supervisory power was left with the Superintendent of Public Works and the Governor. Under section 6 of act 24 of the Laws of 1895, already referred to above, that power was given to the Minister of the Interior of the Republic of Hawaii. By other provisions of that act other supervisory powers with reference to the construction and equipment of the railway were placed with the same officer.

So, too, we have shown that under the franchise these powers were vested in the Minister of the Interior (now Superintendent of Public Works) to supervise the location of the tracks in the streets; in the Governor, to approve of certain matters of construction and equipment of the passenger cars; in the Superintendent of Public Works, to approve of the style of rail and the manner of laying the same, to approve of the material and method of construction of the overhead structure, to approve of various other matters of construction and repair.

Originally granted to an Executive Council, the determination by Congress to commit the control to the Governor and Superintendent cannot be overturned by the court.

It is worthy of note that the powers given to the Governor were in the original franchise given to the Executive Council, consisting of the President of the Republic, the Minister of the Interior, the Attorney General, the Minister of Finance, and the Minister of Foreign Affairs, sitting together. That the power would be safe in so many and so responsible hands is obvious. There is little, if any, room for the contention that the public interests would have been better protected by committing to a single judge the duty in question. This control has been passed by the Organic Act to the Governor, but this was done by Congress in the same act which gave life and vitality to the franchise (section 68, Organic Act), and

which committed to the Superintendent of Public Works the powers granted to the Minister of the Interior. If Congress has determined that the Governor and the Superintendent of Public Works are sufficiently safe officers to exercise this power, it is not the province of the Judicial Department to say otherwise. The argument that the Governor and the Superintendent of Public Works, if vested with this power, would ordinarily act *ex parte* and merely upon hearing the representatives of the corporation, does not appeal to us. They owe a duty to the public as well as the courts, and would ordinarily be found giving notice to both sides of any proposed change before taking any action. Moreover, any action that is taken can be set aside by virtue of the latter paragraph of the provision—"that all rules and regulations may be changed from time to time, as the public interests may demand, at the discretion of the Governor"—and if hasty and improvident action is taken, on the application of any citizen the matter could be reopened. Are the courts justified in presuming in advance that the Governor would not heed such an application or would not act fairly upon it? Of course, we are not contending that the action of the Executive, if arbitrary or confiscatory, would not be open to review by the Judicial Department of the Government, but we are contending that until action by the Executive it is premature for the courts to interfere.

Complainant and the court by the use of the word operate prove our contention.

There is upon the face of the record, in the language of the bill of complaint and of the permanent injunction issued, enough to demonstrate the strength of our construction.

The complainant in its bill found itself compelled, in order to make clear to the court its meaning, to use the verb "operate," which is found in section 9, which section it now contends does not include the matter of time schedules, and does not use the verb "maintain," which is the word used in section

7 under which it asks the court to act. It avers in its bill that certain lines named, including the Liliha-Waialae line, are "operated" by the respondent on a ten-minute schedule (paragraph 4 of bill, Tr., p. 3); that the residents along Liliha Street line use the cars "operated" over and along Liliha street (paragraph 5 of bill, Tr., p. 3); that the residents of Honolulu generally resort to certain connecting lines "as well as the Liliha Street cars *operated* by the respondent," for certain purposes (paragraph 5, *ib.*); that the respondent threatens to modify the existing schedule so that "the said cars so *operated*" on Liliha street between certain hours "will *operate* under a twenty-minute schedule," and to forthwith "*operate* its cars" on Liliha street at certain stated intervals (paragraph 5, *ib.*); that unless enjoined respondent will "*operate* its cars" on Liliha street at certain intervals and will "render the cars so *operated* by it" on Liliha street useless to the public (paragraph 5, *ib.*); and prays for an injunction restraining the respondent "from *operating* its cars" on Liliha street at certain intervals, and that a permanent injunction be issued restraining respondent "from *operating* its cars" on Liliha street at certain intervals (Tr., p. 5). Nowhere in the bill is it charged, either directly or indirectly, that at any time has the respondent failed to "maintain" or keep on hand or have a number of cars sufficient to meet the requirements of public convenience, or that it threatens to do so.

So, too, neither in the temporary nor in the permanent injunction is there any language which expressly or in substance commands the respondent to "maintain" or have on hand or keep passenger cars sufficient in number to meet the requirements of public convenience or to meet any other prescribed test or enjoins it from refraining from keeping on hand a sufficiency of cars. On the contrary the command and the only command is that the respondent "desist and refrain from *operating* the cars * * * along Liliha street * * * at intervals of more than" a stated time

(Temporary Injunction, Tr., p. 6); and from "*operating* over and along Liliha street * * * cars for the carriage of passengers insufficient in number to meet the public convenience and from reducing the number of cars for the carriage of passengers from the number now operated and maintained by it" on Liliha street at certain times and at certain intervals (Permanent Injunction, Tr., p. 15). This use of the word "maintained" in the permanent injunction is the nearest approach to bringing the terms of the injunction within the language of section 7, but, it is submitted, that the attempt is a failure and that clearly the injunction relates purely to operation and not to equipment or maintenance such as is contemplated by Section 7. These extracts, as well as the opinion of the circuit judge (Tr., p. 10) and that of the Supreme Court of Hawaii (Tr., p. 18), show beyond doubt that both courts decided that they had original jurisdiction to fix time schedules for the Liliha or any other line of this street railway, and made no attempt whatever to consider, as indeed it was not charged in the bill, whether or not the respondent had faithfully obeyed the mandate of section 7 that it should at all times maintain a sufficient number of cars to meet the test in that section prescribed.

If not Reserved to Executive Control, Then Reserved to the Legislature and not the Courts.

The cases which we have already cited show that if this power is not reserved in the executive and the administrative branch of the government, committed to them by legislative acts, the discretion of control is reserved to the legislature. It is not our contention that it is so reserved, our contention being that it is reserved to the Executive, but if this court should agree with the Supreme Court of Hawaii that the language is not clear enough to reserve the power to the Executive, then we earnestly contend, on the authorities already cited by us, that it remains, so far as not granted to the corporation, in the legislature itself.

III.

The Action was Prematurely Brought.

We refer to this point chiefly because it illustrates our contention that whatever reserved power of control there may be is vested in the Executive and Administrative Department. The facts of this case strongly illustrate the impolicy of committing the matter to the courts, and demonstrate that the action, if it can be maintained, is premature. The corporation, after consultation with committees of its patrons, had agreed upon a compromise service and had applied, under section 4, to the Superintendent of Public Works for permission to install the necessary switches so as to give this service (Tr., p. 29) when this suit was brought. In effect the action of the court is directed and seeks to control indirectly the action of the Executive Department before it has acted. A construction of section 9 which leads to this result is at war with the entire act. Our construction is that the whole act works together. We apply to the Superintendent of Public Works for permission to change our switches; we fix our schedule, and ask the approval of the Governor—the superior to the Superintendent of Public Works. If their actions are in excess of authority, or violate any constitutional, statutory, or contractual right, it is time enough then for the courts to interfere. Until then such action is clearly premature.

We respectfully ask that the judgment of the Supreme Court of Hawaii be reversed.

Respectfully submitted,

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APPENDIX.

ACT 69, SESSION LAWS OF REPUBLIC OF HAWAII, APPROVED JULY 7, 1890, INCORPORATED AS CHAPTER 66, SECTIONS 835 TO 871, REVISED LAWS OF HAWAII (ORIGINALLY ACT 69, SESSION LAWS OF 1898).

SEC. 1 (§ 835). DEFINITIONS.—"Wherever in this Act the following words occur they shall be held to have the force and meaning herein set forth unless the context clearly indicates otherwise:

"Said Association and others" shall represent and mean Clinton G. Ballentyne, Frederick J. Lowrey, Theodore F. Lansing, James A. Kennedy, Charles S. Desky, Joseph A. Gilman, James F. Morgan, George R. Carter and J. H. Soper, their associates and assigns, or such corporation as may be organized by them, as named in the second Section of this Act.

"Executive Council" shall refer to and mean the Council designated as the Executive Council in the Constitution of the Republic.

"Minister of the Interior" shall refer to and mean the person from time to time acting as the Minister of the Interior as defined in said Constitution, or his lawful successor in said office.

"Railway" shall refer to and mean the rails, tracks, roadway, with its appurtenances, appliances and connections to be placed in streets, roads or places on the Island of Oahu, as by this Act provided, or to such rails, tracks, roadway, etc., of any other corporation as may now be in existence or that may hereafter be laid.

"Honolulu" or "District of Honolulu" shall refer to and mean all of that portion of the Island of Oahu included in the judicial, educational and taxation district, now defined by law as the "District of Honolulu" or "Honolulu District."

SEC. 2 (§ 836). RIGHT OF WAY.—"The right is hereby granted to Clinton G. Ballentyne, Frederick J. Lowrey, Theodore F. Lansing, James A. Kennedy, Charles S. Desky,

Joseph A. Gilman, James F. Morgan, George R. Carter and J. H. Soper, and to their associates and assigns or to such corporation as may be organized by them, to construct, lay down, maintain and operate for the term of thirty years, after the railway authorized by this Act shall have been commenced, a railway, either single or double track, or partly single and partly double, with such curves, switches, turnouts, poles, wires, underground or overhead conduits, and such other appliances and appurtenances as may from time to time be necessary for the use and operation thereof, along and upon the following streets, roads and places, in the District of Honolulu, upon said Island of Oahu, to wit:

"11th. Whenever the majority of the owners of property on any street or road in said Honolulu shall, in writing, petition said association and others to lay a railway in such street or road, and the (Executive Council) Governor shall consent thereto, such railway may be laid thereon, and thereafter may be maintained and operated for the unexpired term of the franchise."

SEC. 3 (§ 837). MOTIVE POWER.— "The said railway shall be operated by electric power, either by overhead or underground wires or by storage batteries, or by such other method as may be an improvement upon either; or by compressed air; or by such other motive power as the said association and others may from time to time elect, subject nevertheless to the prior consent and approval of the (Executive Council) Governor: *Provided, however*, That a part of such railway may be operated by one motive power, while another or other portions thereof may be operated by another or other motive powers, with the consent and approval as aforesaid; and further provided, that it shall not be lawful to operate the whole or any part of said railway at any point between Diamond Head and the western boundary of Kalihi, or between the sea coast on the one side, and a line drawn parallel or nearly parallel to the sea coast and a mile and a half distant therefrom, upon the other side, with any car, engine or other vehicle emitting steam, smoke or offensive odors, or burning coal or any other fuel while running upon any of the streets, roads or places within said area, nor with animals attached to the cars.

"2. If the said association and others, at any time, by lease or otherwise acquire the rights, franchises and property of any other person or corporation operating a street railway in

Honolulu, or elsewhere on said island of Oahu, the motive power in this section authorized may be used upon the railway so acquired; and all of the rights, privileges, powers and authority by this chapter conferred with reference to the occupation of streets, maintenance and operation of railways, cars, and other powers by the same conferred, are hereby authorized in the maintenance and use of the property so acquired.

"3. The motive power by this section authorized may be used for all of the purposes of railway traffic, whether in the transportation of passengers, mail, freight or otherwise."

SEC. 4 (§ 838).—METHOD OF CONSTRUCTION.

"1. The said railway, together with all its branches and connections shall be thoroughly and substantially constructed according to the best modern practice, and in such manner as to cause the least obstruction to the free use of the streets, roads, and places in which it may be laid; and the location in the streets shall be as directed by the (Minister of the Interior) Superintendent of Public Works.

"2. The cars for carrying passengers shall be of the most approved construction for the comfort, convenience and safety of such passengers, and shall be provided with fenders of the best pattern, and with proper lighting and signalling appliances, and with proper numbers, route boards or signs, as approved by the (executive council) Governor.

"3. The tracks shall not exceed in width four feet, eight and one-half inches between the rails.

"4. The said association and others shall pay all expenses and damages and save the Territory harmless and indemnified from all loss, cost, damage, and expense, in consequence of, or arising from the construction and operation of said railway, and pay for all repairs to the streets in which the same may be located, made necessary or advisable by the construction and operation of said railway.

"And said association and others shall so provide for their electric currents and provide such conductors thereof, and of return currents that avoidable injury or deterioration shall not occur, nor be done to the water pipes, sewer pipes, gas pipes, or other property of the Territory or of any person or corporation and shall save the said Territory, or any person or corporation, harmless and indemnified from all loss, cost, damage and expense by reason thereof.

"5. The style of rail to be employed by the said association

and others in constructing and laying down the several railway tracks, and the manner of laying such rails shall be such as may be approved of by the (Minister of the Interior) Superintendent of Public Works, provided, however, that the weight of such rails shall not be less than 56 pounds per yard.

"6. In laying down the said tracks not more than one block on any one line shall be obstructed at any one time, and the work shall be carried on continuously until completed.

"7. The construction of said railway must be commenced within one year after (the passage of this act) July 7, 1898, and at least ten miles must be completed, equipped and ready for the transportation of passengers within two years after such commencement and for the faithful performance of which said association and others shall give their bond in the penal sum of five thousand dollars, to the (Minister of the Interior) Superintendent of Public Works, said bond to be forfeited to the Government in case of failure to complete and equip said ten miles of railway within the said two years; and the remainder thereof must be likewise completed, equipped, and ready for the transportation of passengers within four years after such commencement; and the franchise hereby granted shall cease and wholly determine as to any street, roads or places not occupied in accordance with the provisions hereof within said period, provided that if there is any period during which the work shall be suspended by reason of actions or injunctions or other suits, impeding and delaying construction or use, the time so lost shall not be counted as part of the periods of one, two, and four years.

"8. Trolley wires shall be of a height of not less than 16 feet above the street. All guard wires, above, and on both sides of the trolley wire, shall be approved as the (Minister of the Interior) Superintendent of Public Works may deem expedient or necessary. The size and location of such wires, and the manner of supporting them, shall be subject to the approval of the said (Minister of the Interior) Superintendent of Public Works.

"9. The said association and others, whenever the streets are paved or macadamized, shall pave or macadamize the entire space between their tracks, or between the outside rails of double tracks if more than one track be laid, and for one foot outside of the outer rails, and such paving or macadamizing shall be flush with the streets, and correspond with the

paving or macadamizing of the remaining portion of said street; and shall be so laid that the rails shall be flush with the streets. And the said association and others shall keep their tracks, and their portions of all the streets, in good repair, such repair when made to be approved by the (Minister of the Interior) Superintendent of Public Works. Repairs, when ordered by said (Minister of the Interior) Superintendent of Public Works, in writing, shall be made by the said association and others within ten days of the date of said order.

"10. All of the matters and things required by this section shall be subject to the approval of the (Minister of the Interior) Superintendent of Public Works.

SEC. 5 (§ 839). POWER HOUSES AND STATIONS.—"The said association and others shall also have the right to construct and maintain all necessary power stations or houses, and such other buildings and structures as may be needed, and to use machinery therein for the purpose of operating said railway; and of building and maintaining stations at such points as may from time to time be necessary."

SEC. 6 (§ 840). HAWAIIAN TRAMWAYS COMPANY.—"1st. Authority is hereby conferred upon the said association and others to occupy the streets and use the tracks of the Hawaiian Tramways Company in accordance with the provisions of Section 3 of Chapter 34 of the Laws of 1884, entitled "An Act granting to William H. Austin and his associates the right to construct and operate a street railroad upon certain streets in the City of Honolulu," provided that the said association and others shall comply with the provisions and requirements of this Section.

"2nd. Whenever it shall be necessary to cross the tracks of any other railway, the said association and others are authorized to construct and lay down, at their own expense, proper crossings, removing the rails so crossed for that purpose; but such construction and removal shall be done in such manner as to least interfere with the traffic of such other railway; and after the said crossings are laid, the expense of maintenance shall be borne equally by the said association and others, and the owners or lessees of such other railway.

"3rd. In the use of any portion of the tracks of the Hawaiian Tramways Company, the cars of the Hawaiian Tramways Company or of the said association and others shall not remain standing on the portion used jointly, but shall make

only such stops as are required to take on and let off passengers."

SEC. 7 (§ 841). "The said association and others shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require, and such other cars designed for the carriage of mails, parcels and goods as they may deem necessary.

SEC. 8 (§ 842). "The rate of speed of the cars of said association and others shall not exceed eight miles per hour within the following limits in the district of Kona, Island of Oahu, viz:

"From the line of South street and Alapai street on the south and east to Liliha street on the north, and from the harbor front to Judd street and Pauoa road.

"On none of the lines of said association and others shall the rate of speed exceed twelve miles per hour. On switches and turnouts and in rounding street corners the rate of speed shall not exceed four miles per hour; also, immediately before entering Thomas square, provided permission to pass through said square shall have been obtained as hereinbefore provided, shall come to a full stop, and after entering the said square shall not run faster than two miles per hour through said square.

"And for each violation of this provision the said association and others shall be subject to a penalty of one hundred dollars, to be recovered in the district court of Honolulu, at the suit of the attorney general of the (Republic) Territory of Hawaii, or any other person to the use of the (Republic) Territory."

SEC. 9 (§ 843).—RATES OF FARE:

"1. Any person riding upon the cars of said railway shall be liable to pay for such transportation the following rates: For a continuous ride anywhere between Diamond Head and Moanalua, or makai of a line drawn parallel to the sea coast, and one and a half miles distant therefrom, not to exceed five cents, provided that children under seventeen years of age, in going to and from school, shall not be required to pay over half fares, for which purpose tickets shall be issued.

"2. For transportation without said limits such rate shall be charged as said association and others shall from time to time fix, subject to the approval of the (Executive Council) Governor.

"3. Upon a continuous trip persons riding upon the cars, and transferring from one car to another upon a connecting line within the limits above mentioned, shall be entitled to a transfer ticket without the payment of an extra fare upon the lines of this railway.

"4. The said association and others shall make reasonable and just regulations with the consent and approval of the (Executive Council) Governor regarding the maintenance and operation of said railway on and through said streets and roads; and the said association and others failing to make such rules and regulations, the (Minister of the Interior) Superintendent of Public Works, with the approval of the (Executive Council) Governor, may make them. All rules and regulations may be changed from time to time as the public interests may demand at the discretion of the (Executive Council) Governor.

"Policemen, firemen, and letter carriers, when on duty and in uniform, shall be entitled to free passage over any of the lines of said association and others.

"If said association and others, or any agent or employee thereof, shall demand or charge a greater sum of money for fare on the cars of said association and others than that fixed by this chapter, such association and others, or such agent or employee, shall forfeit to the person who is thus overcharged the sum of one hundred dollars, to be recovered in a civil action in any court having jurisdiction thereof.

"Upon the trial of an action for any of the sums forfeited as provided above, proof that the person demanding or receiving the money as fare or for the sale of a ticket or check, was at the time of making the demand or receiving the money, engaged in an office of said association and others, or on any vehicle belonging to it, shall be *prima facie* evidence that such person was the agent, servant or employee of the said association and others to receive the money and the ticket or check mentioned."

Sec. 10 (§ 844). (Certain persons may be refused passage.)

Sec. 11 (§ 845). Right of Way on Tracks.—"The cars lawfully occupying and using said railway shall be entitled to and shall have the right of way upon the tracks by this Act authorized to occupy streets, roads and places, as herein mentioned, except that in case of fire such right shall yield to the fire engines during the continuance of such fire in

Honolulu, and to the Honolulu police authorities in case of emergency."

SEC. 12 (§ 845). "The said association and others shall, during the existence of this franchise, at all times, have and maintain an office for the transaction of the business of the railway at some place in Honolulu convenient of access to the public; and the directors of said railway and other persons having charge, management and control thereof shall be residents of the Hawaiian Islands."

SEC. 13 (§ 847). "The said association and others shall have the right at all times to manufacture and construct and repair all the buildings, structures and appurtenances, machinery, cars and all and every other appurtenance or appliance by them required in the construction, equipment, operation and maintenance of said railway, and to create, maintain and use such electric or other power as may be required for the use of such railway, its appurtenances and appliances."

SEC. 14 (§ 848). RIGHT TO PURCHASE OR LEASE.—"The said association and others shall have right to take over, either by purchase or lease, all or any part of the property, real and personal, rights, privileges and franchises, of any other railway, or of any other light or power company, or of any company having objects in whole or in part similar to those by this Act authorized, and shall have when so acquired and may exercise all of the rights, powers, privileges and franchises of such company, whether the same shall be derived by charter or act of the Legislature."

SEC. 15 (§ 849). RIGHT OF CONSOLIDATION.—"The said association and others may unite, amalgamate and consolidate the stock by them issued with that of other persons in a company or companies having similar objects, or may enter into contracts and working agreements, or enter into engagements or leases with, and take shares in the stock of any other company or companies having such similar objects."

SEC. 16 (§ 850). RIGHT TO BORROW MONEY AND ISSUE BONDS.—"The said association and others, whenever from time to time it shall be deemed expedient, in furtherance of the objects by this Act authorized, shall have the power to borrow money and to secure the payment thereof with the interest agreed upon, by mortgages of all or any portion of the property, which may include the franchise, of such association and others, and such mortgages may be issued, or if

it be deemed advisable, in the form of mortgage bonds, secured by trust deed of such property as aforesaid. Such mortgages or trust deeds may, in addition to the property named above, cover also any property or property rights to be acquired after their several dates as well as the income and receipts of the property from whatsoever source derived. Such mortgages and trust deeds may also contain such provisions as the said association and others may deem advisable and proper for the protection of all concerned, relative to payments of interest and principal; possession and operation of said railway or other property; default, remedies, foreclosures, powers of mortgages or trustees in all matters; and all and every other matter which it may be deemed wise and proper to insert therein. Provided that nothing in this Section contained shall operate to prevent said association and others from obtaining the usual business credits and to make promissory notes, without security under seal."

SEC. 17 (§ 851). CHARGES UPON EARNINGS.—"The following charges shall be lawful upon the income of said railway:

"1st. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway.

"2nd. Dividends may be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued.

"3rd. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise. Provided, however, that the amount placed to the credit of such sinking fund annually, shall not exceed in amount, such a sum with interest computed at five per cent. per annum, compounded, as will principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid.

"4th. The excess of income shall be divided equally between the Government of the Territory (Republic) of Hawaii and the stockholders of said corporation.

"5th. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the Minister of the Interior from the beginning of the actual construction of the railway."

SEC. 18 (§ 852). (Penalties.)

Secs. 19-28 (§§ 853-863). (Eminent domain—power and procedure.)

Sec. 29 (§ 864). Reserved Rights and Authority at Law.—"1st. Except as by this Act otherwise so provided, the rights and privileges named in Section 2 hereof are granted to the said association and others upon such terms, conditions and restrictions as now are or may hereafter be imposed by the laws of the Territory (Republic) of Hawaii in relation to the matter of constructing and maintaining street railways in the District of Honolulu, Island of Oahu, and a strict compliance with such laws is hereby required of the said association and others.

"2nd. The right to grade, sewer, pave, macadamize or otherwise improve, alter or repair any or all of the streets, roads or highways above mentioned, and of all other places in said Territory (Republic), is reserved to the Government, and may not be alienated or impaired; but any work in carrying out and performing such reserved rights shall be done in such manner as to obstruct or injure the railway hereby authorized as little as possible; but, if such improvement, alteration or work in accordance herewith upon such streets, or roads necessarily interferes with the grade of such railway, the said railway shall be altered and made to correspond with the improvements, alteration or grade, immediately upon being so required.

"3rd. The said association and others, before laying the railway upon any of the streets or roads in the District of Honolulu, shall ascertain the lawful grade of such streets or roads from the Superintendent of Public Works (Minister of the Interior), who shall furnish the required information within a reasonable time. The tracks of such association and others shall conform to the grades of said streets or roads on which they are laid down as furnished by the Superintendent of Public Works (Minister of the Interior), or other officer duly appointed by him, and the said association and others shall not in any way change or alter the same without the written consent of the Governor (Executive Council). And the Territory (Hawaiian Government) reserves forever the right to change the line and grades of its streets at any time that the public interests demand such changes; and the said association and others, shall, at its own cost, within thirty days, conform to such new lines or grades in reconstructing its tracks or lines, upon receiving notice in writing

from the Superintendent of Public Works (Minister of the Interior), and such changes shall be made subject to the approval of the Superintendent of Public Works (Minister of the Interior). And in all cases of street improvements by the Government, the said association and others shall conform to all such improvements, in the kind of pavement and the manner of laying the same, as directed by the Superintendent of Public Works (Minister of the Interior).

"In case of neglect by the said association and others to make such repairs, changes or improvements required of it by this Section, they shall be made by the officers, servants and employees of the Territory (Hawaiian Government) and the cost of such repairs, changes or improvements may be recovered by the said Government, from the said association and others."

SEC. 30 (§ 865). "All material required by the said association and others to be used for the purpose of this Act, when imported from the United States, and being the product or manufacture of the said United States shall be free of duty, and the property of the said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped the completed and equipped portions shall become liable to such taxation."

SEC. 31 (§ 866). "Said Railway or Corporation shall pay in annual payments to the Department of the Interior the sum of ten dollars per annum as a license tax upon each passenger car used by it or them, and no greater sum shall be exacted as Car License."

SEC. 32 (§ 867). "All orders, permits, or approvals, as provided for in this Act, shall be in writing."

SEC. 33 (§ 868). PLANT, BOOKS, ETC., OPEN TO INSPECTION.—"The entire plant, operation, books, and accounts of said association and others shall from time to time be subject to the inspection of the (Minister of the Interior) Superintendent of Public Works or other officer appointed by him for the purpose."

SEC. 34. "None of the rights or privileges enumerated in this Act shall be exercised by the persons forming the association set forth in Section 1, nor by their assigns, until a corporation shall have been duly organized under the laws of this Republic, for the purpose of constructing, operating and maintaining the lines of railway mentioned in this Act, hav-

ing a capital stock of not less than two hundred thousand dollars and all the said rights and privileges assigned to said corporation without reserve."

SEC. 35 (§ 869). "The said association and others shall provide such receptacles upon their street cars as shall be approved by the Postmaster-General for the conveyance free of charge of all letters."

SEC. 36 (§ 870). "Whenever the said association and others or any corporation which may have been duly organized under the laws of this (Republic) Territory for the purpose of constructing, operating, and maintaining the lines of railway mentioned in this chapter, and as by this chapter provided, refuses to do or fails to do or perform or carry out or comply with any act, matter or thing requisite or required to be done under the provisions of this chapter and shall continue so to refuse or fail to do or perform or carry out or comply therewith, after due notice by the (Minister of the Interior) Superintendent of Public Works to comply therewith, the (Minister of the Interior) Superintendent of Public Works shall with the consent of the (Executive Council) Governor cause proceedings to be instituted before the proper tribunal to have the franchise granted by this chapter and all rights and privileges granted hereunder, forfeited and declared null and void."

SEC. 37 (§ 871). "It shall not be lawful to increase the capital stock of said corporation, at any time in excess of said two hundred thousand dollars, unless the proposed increase shall when taken with the said original capital stock, represent only the actual cost of the property of the railway, and not over twenty-five per cent. of such cost in addition thereto; such cost may include all expense of laying tracks and equipping the road for public use, and may also include all subsequent extensions, but no such increase shall be authorized for extensions until they shall be determined upon and authorized by a vote of the corporation."

ACT 78, SESSION LAWS OF 1905, HAWAII.

"SECTION 1. Section 842 of the Revised Laws of Hawaii is hereby amended by adding at the end thereof the following proviso:

"*Provided, however*, That with the approval of the Governor, the Superintendent of Public Works may authorize a

rate of speed not exceeding twenty (20) miles an hour between any stated points on any line not within the limits described in paragraph two of said section, and within the limits of paragraph two of said section, may authorize a rate of speed not exceeding twelve (12) miles an hour, and may in like manner withdraw such authorization; and, provided, further, that for any violation of such speed limit for the time being, the same penalty shall apply as hereinbefore mentioned.

"*Provided, however*, That the Company shall have no power to plead as a defense or take advantage of the fact in any action brought against it for loss or damages occasioned by the Company to any person that the cars of the Company causing such loss or damages were running at the rate of speed authorized by or by virtue of this act."

Office Supreme Court, U. S.
FILED.
OCT 13 1908
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1908.

No. 412.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
Appellant,

vs.

THE TERRITORY OF HAWAII, *by* C. R. HEMENWAY,
Attorney General, Appellee.

MOTION TO ADVANCE AND SET CAUSE FOR HEARING.

C. R. HEMENWAY,
Attorney General of Hawaii, for Appellee.
DAVID L. WITHINGTON,
A. S. HARTWELL,
ALEX. BURTON,
Attys for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1908.

No. 412.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
APPELLANT,

vs.

THE TERRITORY OF HAWAII, BY C. R. HEMENWAY,
ATTORNEY GENERAL, APPELLEE.

MOTION TO ADVANCE AND SET CAUSE FOR HEARING.

Come now C. R. Hemenway, Attorney General of Hawaii, for the appellee, and David L. Withington, A. B. Browne, and Alexander Britton, attorneys for the appellant in the above-entitled cause, and move this honorable court that this cause be advanced and set for hearing on the first Monday in November.

The foregoing motion is based upon the statement of C. R. Hemenway and David L. Withington, respectively attorneys for the appellant and appellee in this case, hereto annexed, and made a part hereof.

Dated WASHINGTON, D. C., *October* 12, 1908.

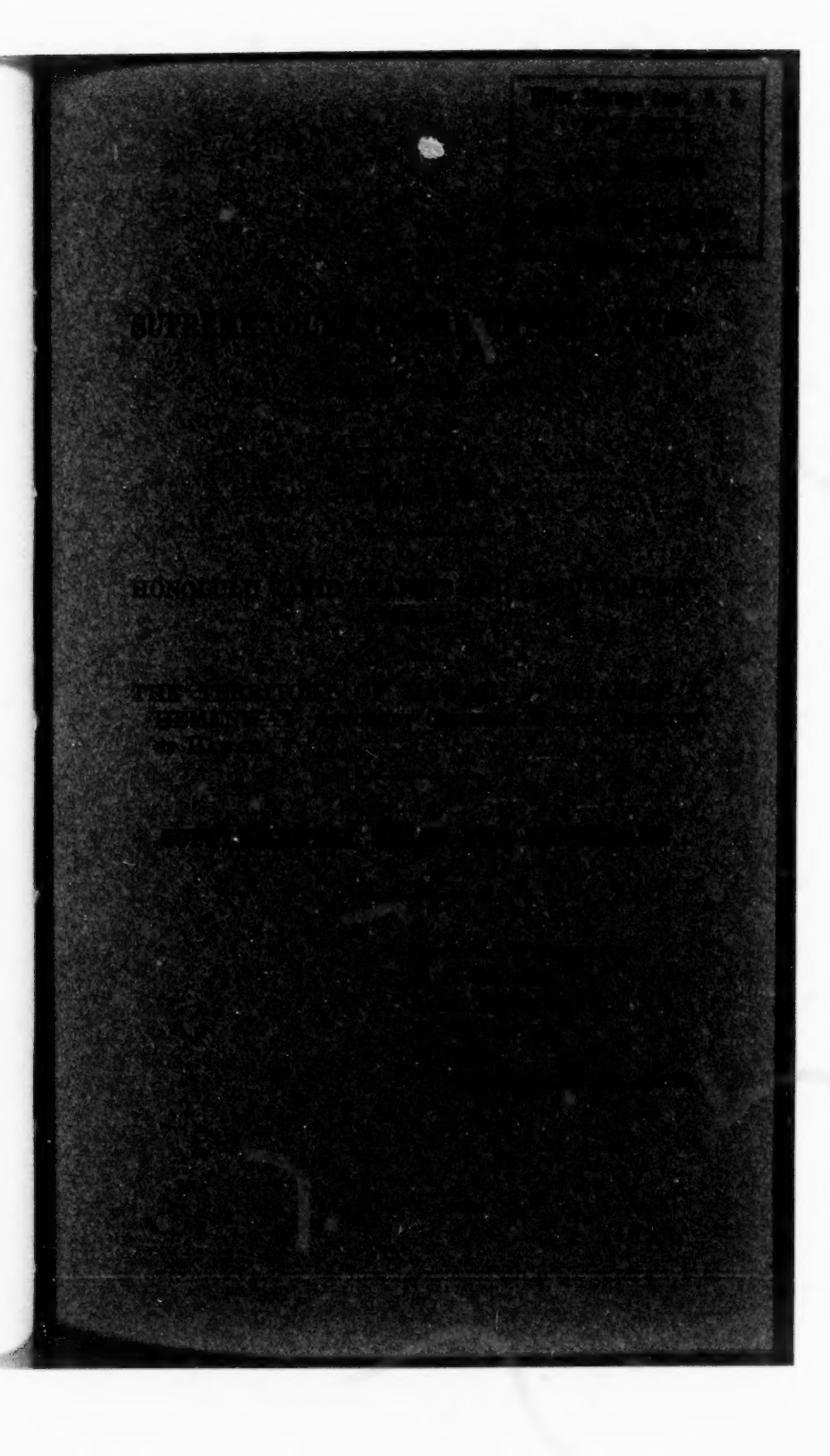
C. R. HEMENWAY,
Attorney General of Hawaii, for Appellee.
DAVID L. WITHINGTON.
A. B. BROWNE.
ALEX. BRITTON.

Statement.

The above-entitled cause is of great and pressing importance to the public interests of the Territory of Hawaii, and, to a less degree, to the people of the United States, in this, that the decision of the Supreme Court of the Territory of Hawaii was that section 843 of the Revised Laws, being section 9 of act 69 of the Session Laws of 1898 of the Republic of Hawaii, passed July 7, does not grant to the Governor of Hawaii discretionary power in regard to the maintenance and operation of the Honolulu Rapid Transit and Land Company, but that such control rests in the courts, and is subject primarily to judicial inquiry and determination; that the United States of America is now engaged in establishing great naval and military stations near Honolulu; that it is desirable in the public interests that a further extension of the lines of the Honolulu Rapid Transit and Land Company should be early made in connection with this public work; that surveys have been made for the same, but the uncertainty of the power of the Executive to make or approve rules and regulations covering the maintenance and operation of the road, under the act, is a serious, if not insurmountable, obstacle; that, in addition, rules and regulations for the maintenance and operation of the existing lines have already been approved by the Executive of Hawaii, and from time to time occasions are arising for changes in the same, in order to give an adequate and satisfactory service to the citizens of Honolulu, and in the existing uncertainty of the law, arising from the decision of the Supreme Court of Hawaii and the appeal to this court, it is impossible for the appellant here to adequately and satisfactorily meet its obligations as a public service corporation until the question involved in this case has been settled by a decision of this court. That appellant owns and operates the only street railway system in Honolulu.

In addition, counsel for both parties have attended at this time, at great expense, on the argument of other cases specially assigned, and that in the case of the Territory of Hawaii the appropriation made by the legislature to defray the expense of argument of territorial causes before the Supreme Court of the United States and other appellate courts outside of the Territory, which was made for a period of two years, which will not expire until the first day of July, 1909, is completely exhausted by the present attendance of the Attorney General, and the Territory will have no means with which to adequately present said cause unless the cause can be advanced.

C. R. HEMENWAY,
Attorney General of Hawaii.
DAVID L. WITHINGTON.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 412.

HONOLULU RAPID TRANSIT AND LAND COMPANY, APPELLANT,

vs.

THE TERRITORY OF HAWAII, BY CHARLES R. HEMENWAY, ATTORNEY GENERAL OF THE TERRITORY OF HAWAII.

SUPPLEMENTAL BRIEF FOR APPELLANT.

The argument that "the Franchise Act is a territorial "statute to the same extent as the other acts of the legislature "of the Republic of Hawaii which were continued in force "by Congress," to which *Kawananakoa v. Polyblank*, 205 U. S., 349, is cited, overlooks decisive considerations.

The granting of the franchise was an act of sovereign power, whereas the Polyblank case held that the exemption from suit did not arise from the concept of sovereignty, but from "the logical and practical ground that there can be no "legal right as against the authority that makes the law on "which the right depends," and a distinction is drawn between the District of Columbia and a territory which is assimilated to a state, in this respect. But it is well settled that the granting of a franchise is an act of sovereignty. Again, this conclusion of the court is based on the act of April 30, 1900, chap. 339, sec. 655, 31 Stats., 141, 142, 150. A comparison of these sections shows that a franchise stands

in an excepted class as regards the general legislation of the islands. It has been held of this act "that to obtain a com-" prehensive view of the intention of Congress we are bound " to consider the whole act so far as it relates to the dispo-" sition of judicial power" (*Carter v. Gear*, 197 U. S., 348).

In respect to legislative power the same must be done. It is true that by section 6 "that the laws of Hawaii *not incon-" sistent with the Constitution or laws of the United States or " the provisions of this act* shall continue in force subject to " repeal or amendment by the legislature or the Congress of " the United States," and by section 55, "that the legislative " power of the Territory shall extend to all rightful subjects " of legislation *not inconsistent with the Constitution and " laws of the United States locally applicable*." But it appears that franchises are excepted, and their granting is "inconsistent." Thus by section 55 "the legislature shall not " grant to any corporation, association, or individual any " special or exclusive privilege, immunity, or franchise with-" out the approval of Congress," and by section 73, page 154 expressly applicable to this particular franchise, "that, sub-" ject to the approval of the President, all sales, grants, leases " and other dispositions of the public domain, and agree-" ments concerning the same, and all franchises made by " the Hawaiian Government, in conformity with the laws of " Hawaii, between the 7th day of July, 1898, and the 28th " day of September, 1899, are hereby ratified and confirmed."

These clauses show that it was not intended to "continue " in force" franchises or to allow the Territory to grant franchises, as it had the privilege of enacting other laws, but only to do so with the approval of Congress, which approval was necessary in order to give them vital force, and that specifically this franchise was not continued in force, but was given such vital force by the approval and confirmation. It is true that to ratify and confirm is equivalent to giving the actor a previous authority (*Norton v. Shelby County*, 118 U. S., 425), but these citations show that the original authority was not to grant a franchise, but to grant it subject

to the approval of Congress. Now Congress has shown by its approval of sundry franchises its understanding of this. It has re-enacted the franchises and ratified and confirmed them, and provided that Congress or the legislature, with the approval of Congress, may alter, amend, or repeal the same (Electric Light Franchise, chap. 1405, 58th Congress 33 Statutes-at-Large, 227; Gas Franchise, chap 1406, 58th Congress, 33 Statutes-at-Large, 231; Telephone Franchise chap. 3441, 59th Congress, 34 Statutes-at-Large, p. 309) It seems to us this form of ratification and confirmation is the grant of an original authority by Congress, only amendable by it within the decision of *Murphy v. Utter*, 186 U. S., 95.

As to the point that this court should follow the decision of the court of Hawaii as persuasive, as this is a territorial grant of Congress, there is another reason which is conclusive of this contention, namely, that the court here is construing a contract, and the decision of the court below cannot deny us our rights under the contract (*Jefferson Branch Bank v. Skelly*, 1 Black., 436, 443; *Douglas v. Kentucky*, 168 U. S., 488, 501; *Powers v. Detroit & Grand Haven Ry.*, 206 U. S., 543,556). Moreover, the decision of the court below upon the main point as to whether the control of our discretion is in the Executive or primarily in the courts is not persuasive enough to convince counsel, who does not attempt to defend it, but merely to ask this court to follow it. His argument is that section 7 standing alone might give the court that power. Our contention is that, reading the whole franchise, sections 9 and 7 together, before the courts can intervene, the Executive must have its chance.

Respectfully submitted,

DAVID L. WITHINGTON,
A. B. BROWNE,
ALEX. BRITTON,
W. R. CASTLE,
A. PERRY,
Attorneys for Appellant.

Office Supreme Court, U. S.
FILED
NOV 6 1908
JAMES H. McKENNEY,
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SUPREME COURT OF THE UNITED STATES.

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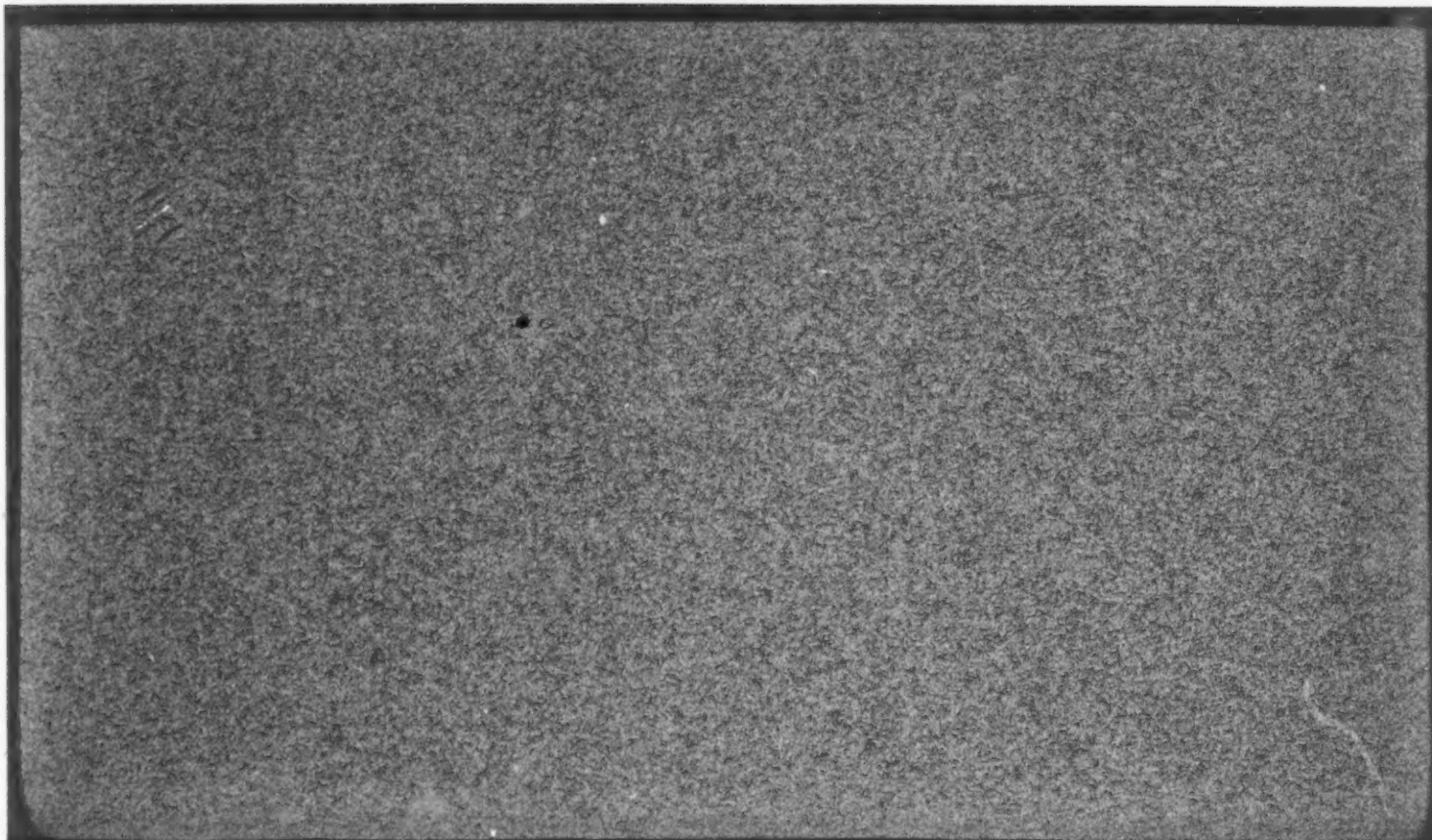
THE TERRITORY OF HAWAII, BY CHARLES R. HEMENWAY, ATTORNEY GENERAL OF THE TERRITORY OF HAWAII.

BRIEF AND ARGUMENT FOR APPELLEE.

C. R. HEMENWAY,
Attorney General of Hawaii, for Appellee.



SUPREME COURT OF THE UNITED STATES.

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HONOLULU RAPID TRANSIT AND LAND COMPANY, APPELLANT,

v.

THE TERRITORY OF HAWAII, BY CHARLES R. HEMENWAY, ATTORNEY GENERAL OF THE TERRITORY OF HAWAII.

BRIEF AND ARGUMENT FOR APPELLEE.

Statement.

This was a bill in equity brought by the Territory of Hawaii, at the relation of its Attorney General, against the Honolulu Rapid Transit and Land Company, holding a franchise under acts 69 and 70 of the Session Laws of the Republic of Hawaii, 1898, approved by the President under the provisions of section 73 of the Organic Act, for operating an electric railway within the district of Honolulu. The bill sought an injunction to prevent respondent from running its cars, during certain portions of the day, at less frequent intervals than ten minutes each way. The various lines operated by the defendant are shown on a map filed as an exhibit herein (Tr., p. 14). These lines are known as the "Liliha-Waialae" line, the "King Street" line, the "Puna-

hou" line, the "Nuuanu Street" line, the "Manoa" line, the "Alakea Street" line, and the "Emma Street" line. With the exception of the Manoa line and that portion of the Liliha-Waialae line between River street and Koko Head avenue, they are operated on a ten-minute schedule. The Liliha-Waialae line runs on Liliha street to the corner of King, where it connects with the King Street line; thence along King, Hotel, Alapai, Beretania, and Alexander streets, where it again connects with the King Street line and also with the Punahou line at Pawaa Junction; thence along King street and King street extended and the Waialae Road to a terminus at Koko Head avenue. The line also connects with the Punahou and Nuuanu lines at Fort and Hotel streets, and with the Alakea street line at Hotel and Alakea streets. Upon this line cars are operated on a ten-minute schedule on Wyllie street as far as River street, and on the rest of the line on a twenty-minute schedule.

It was alleged that the convenience of the public required a continuation of the ten-minute schedule, as now maintained, and that the company, "in violation of the rights of the public and its duties under the law and the requirements of its charter, threatens and proposes to forthwith modify the schedule of the said 'Liliha-Waialae,' to the end that the said cars so operated over and along said Liliha street between the hours of nine o'clock in the morning and four o'clock in the afternoon and between the hours of six o'clock in the afternoon and twelve o'clock midnight will operate under a twenty-minute schedule."

A temporary injunction issued.

The Company answered, denying the jurisdiction of the court and setting up that the complaint did not show any cause which warranted the exercise of its equitable jurisdiction; that the Territory was not a proper party nor had authorized the proceeding; that the Company was exercising its right under and by virtue of section 73 of the Organic Act and the approval of the President in pursuance thereof,

given on the 25th day of June, 1900; denying that public convenience required the ten-minute schedule all day long, and alleging "that, in the endeavor to improve the service on the said Liliha-Waialae line, it purposed to make said service a continuous fifteen-minute service from Waialae through to Liliha street, but that after a conference between the officials of said Company and Messrs. George R. Carter, F. T. P. Waterhouse, and L. L. McCandless, representing the patrons along the Liliha Street end of the line, and Messrs. E. A. Berndt, W. L. Howard, and W. M. Minton, representing the Waialae portion of said route, and after a thorough canvass of the situation and a discussion of all the facts in regard to the necessities of travel at each end and the convenience of the general public, it was unanimously agreed, and at the unanimous recommendations of said committees this Company consented to change its plan and to modify the schedule of said Liliha-Waialae line substantially as alleged in the bill of complaint, and was proceeding to carry said change into execution at the time of the service of this injunction, and that said proposed service is all that the exigencies of the travel along said line and the accommodation of the patrons of the road demand, with a view to the economical operation of said system, and is an ample service under all the conditions" (Tr., pp. 7-8).

A permanent injunction issued, which, omitting the formal part, is as follows:

> "And it appearing that the said respondent on the 7th day of September, A. D. 1907, and since, maintained and operated, and now maintains and operates, each and every day, between the hours of 5:45 a. m. and 11:42 p. m., over and along Liliha street, within the district of Honolulu, county of Oahu, cars for the carriage of passengers, both ways, with the exception in respect to the first car up or northerly, and the last car down or southerly when only one way, at intervals of not more than ten minutes;
>
> "And it also appearing that the public convenience requires the number of cars now and so operated by

the said respondent over and along the said Liliha street, during the said times, and that a less number of cars for the carriage of passengers over and along said Liliha street is insufficient to meet the requirements of public convenience;

"It is hereby ordered, adjudged and decreed that the respondent, the Honolulu Rapid Transit and Land Company, be, and it is hereby perpetually enjoined from operating over and along Liliha street, within the district of Honolulu, county of Oahu, cars for the carriage of passengers insufficient in number to meet the public convenience and from reducing the number of cars for the carriage of passengers from the number now operated and maintained by it over and along said Liliha street daily, between the hours of 5:45 a. m. and 11:42 p. m., to wit: one car every ten minutes, both ways, with the exception in respect to the first car up or northerly and the last car down or southerly when only one way" (Tr., p. 15).

The Railroad Company appealed to the Supreme Court of Hawaii, which affirmed the decree (Tr., pp. 30, 31), and an appeal was taken to this court.

The Supreme Court of Hawaii found the following facts:

"(1) The Honolulu Rapid Transit & Land Co. is a corporation organized in pursuance of and possessing a franchise granted by act 69 of the Republic of Hawaii July 7, 1898, the franchise having been approved by the President of the United States June 25, 1900, in accordance with the provisions of Sec. 73 of the Organic Act of the Territory of Hawaii of April 30, 1900.

"(2) Said Company operates a single track street railway system in Honolulu and among other lines of said system one known as the Liliha St.-Waialae line. The line on Liliha street was part of the first line operated by the Company and has been operated as parts of various lines from and after September 1, 1901, and during all that time a ten-minute service has been given on that street.

"(3) In 1904 the car service of the Company was extended to Waialae, a suburb on the east side of

Honolulu, the Waialae cars first running on a thirty-minute schedule to and from Pawaa junction.

"(4) Since the latter part of 1905 a car has been run every twenty minutes during the day from the junction of Wyllie street and Liliha street to the terminus at Waialae, the line passing through the business portion of Honolulu of which the center is Fort street, while the alternate cars constituting the ten-minute service on Liliha street stopped at River street. Connections were made at the foot of Liliha street with the ten-minute service on the King Street line and the bulk of the travel transferred at this point to and from the King Street line which is the longest and most important line of the Company.

"(5) The population of Honolulu is about 40,000.

"(6) The map of Honolulu in evidence, showing the street car system, may be referred to as part of these findings.

"(7) The company proposed to change the service so as to give, with the same number of cars, a fifteen-minute service throughout the Liliha St.-Waialae line and procured permission from the superintendent of public works to change its switches so as to give this service. Objection was made by some of its patrons. After conferences with a committee which urged a ten-minute service throughout the line the company agreed that a compromise service would be given of twenty minutes during the entire day and ten minutes from 5:45 a. m. until 9 a. m. and from 4 p. m. to 6 p. m. The Company applied to the superintendent of public works for permission to install the necessary switches so as to give this service. This suit was brought by the Attorney General at the request of dissatisfied residents of the district served by the Liliha Street line.

"(8) The evidence showed that public convenience required the continuance of a ten-minute service on Liliha street.

"The court is of the opinion that the eighth finding is a finding of fact, but upon the appellant's contention that it is a mixed question of law and fact and its insistence that its rights in the Supreme Court of the United States would be prejudiced should the Su-

preme Court take its view of the matteer, and there should be in the record no findings of fact upon which said eighth finding was based, the court makes the following findings of the principal evidential facts leading to its eighth finding:

"(8*a*) A ten-minute service on Liliha street has been continuously maintained since the beginning of the operation of the street railway system by the Company in Honolulu, to wit, since about September, 1901.

"(8*b*) During that period there has been a steady increase in the population of the district served by Liliha Street line.

"(8*c*) Property in the section served by the Liliha Street line has been purchased and houses built in reliance upon a ten-minute service.

"(8*d*) There is a definite prospect of further increase in the population of the district served by the Liliha Street line owing to a recent sale of homestead lots at Alewa by the government.

"(8*e*) There was testimony of individual patrons tending to show that public inconvenience would result from the proposed change.

"(8*f*) The entire system of the company is operated at a profit.

"(8*g*) The evidence did not show either that the Liliha Street line or the Liliha St.-Waialae line was operated at a loss.

"(8*h*) The remainder of the defendant system except the two outlying districts of Manoa and Waialae is operated upon a ten-minute service" (Tr., pp. 29 and 30).

The assignment of errors filed presents two main questions of law:

1. The jurisdiction in equity to enjoin a change in the car service.

2. The construction of the franchise act giving the public a right to be heard before the courts.

ARGUMENT.

I. *The equitable jurisdiction of the courts was properly invoked in this case.*

It is argued, as the first proposition advanced by appellant, that the courts of Hawaii had no jurisdiction over the cause of action alleged in the bill filed in this case, and no right, therefore, to grant the relief sought by plaintiff below; that mandamus is the proper and only remedy to enforce a statutory obligation, and that, in any event, the courts had no power of control over appellant here.

This same contention was made by appellant before the circuit judge who heard this cause and before the Supreme Court of Hawaii, and in both courts was overruled.

Many authorities apparently sustaining this contention were cited below and are again cited to this court. But it is now urged by the Territory that the fundamental difference between the remedies of injunction and mandamus is overlooked by appellant, and that in view of the facts alleged in the bill, and proved upon the hearing in this case, injunction was the proper remedy to seek on behalf of the public, and its relief was properly granted by the courts.

The facts found show clearly the reasons for the granting of this relief, and show too a case proper for the intervention of equity.

Since September, 1901, appellant had been operating on Liliha Street, Honolulu, a single-track street railway, which was part of the first line of railway put into operation under the franchise held by it. From its inception this line had been operated on a ten-minute schedule. During this period of over six years there had been a steady increase in the population of the district served by this line, and property had been purchased and homes built in reliance upon a continuation of the existing service. A definite prospect existed of a further and early increase in the population of this

district. It appeared that appellant proposed, and was intending, to change the existing condition of affairs by giving to this district during the greater part of the day a twenty-minute service only, the ten-minute schedule being continued merely during the early morning hours, and for two hours late in the day, when commonly the day's work is done and the workers go to their homes. It appeared also that the reason for this change was to allow appellant, with little or no added expense to itself, to give an increased service to another district far distant from that served by the Liliha Street line, *i. e.*, the district of Waialae (Tr., pp. 29 and 30, and map, p. 15).

From these facts arose the complaint which resulted in the filing of this bill and the issuance of the injunction preventing the proposed change.

The argument advanced by appellant seems to be predicated upon the assumption that since a remedy exists by mandamus for a violation of a statutory obligation, therefore no other remedy can be sought or properly extended. This reasoning leads to the conclusion that therefore, assuming that a statutory obligation rested upon the appellant here to maintain a sufficient number of cars to meet the convenience of the public, still the public would be obliged to wait until actually put to great inconvenience before it would be possible to ask for relief. In other words, the public could not ask for preventive relief from a threatened invasion of public rights, but must wait until the threatened injury had been done, and then come into court seeking for relief. It would seem that, on the fundamental principles of justice, this argument should answer itself. If by the franchise act which made possible the construction of this railway the public have any rights as to the conduct and operation of the road, and the service to be given, then it should follow as a matter of justice that such rights can be protected by preventing their infringement as well as by seeking relief after such rights have been denied or taken away. It should not be any more necessary for the public to wait until a threatened

violation of a charter obligation is an accomplished fact before taking steps to protect its rights than it is necessary for the private citizen to wait until he has been injured by a breach of a specific contract right for which an action at law would not afford adequate relief before seeking his remedy. It is apparent from the statement of the case and from the argument advanced by appellant that adequate relief could not here be afforded by mandamus, because of the difficulty there would be in determining the number of cars required to furnish a service sufficient to meet the public convenience. This very difficulty gives a further reason for the intervention of equity, for, as the Supreme Court of Hawaii remarked in its opinion (Tr., p. 25), "a definite and clear standard of public convenience in this regard has been established by the defendant corporation in its maintenance, since it began operations, or for about six years, of a ten-minute schedule upon Liliha street."

Furthermore, when a corporation is acting or threatening to act in excess of its corporate power, or is misusing the franchise it possesses, to the injury of others, an injunction to restrain it is the proper remedy. Such an injunction may be obtained by the public when the injury is one affecting the public, even without making an affirmative showing of any special or particular injury.

> "Having thus lost, as against the State, any right of construction of its branch across the highway, an injunction must issue against this excessive use of power, without regard to the question of actual damage. Upon this point I have nothing to add to the reasons given in my first opinion directing a preliminary injunction, except that since that opinion, and in a later English case (Att'y Gen. *v.* London, etc. Ry. Co., 1 Q. B., 78 (1909)), the Court of Appeals has affirmed the rule that on applications by the attorney general to restrain a public company from the excessive use of power, it is not necessary to

prove that injury to the public results from the infringement."

Grey, Att'y Gen., *v.* Greenville, etc., R. Co., 60 N. J. Eq., 153, 158.

"It may frequently better serve the public interest to restrain a corporation from exceeding its powers in an unlawful direction than to punish it by penal remedies, or to forfeit its charter, and the attorney general may elect which course he will take."

Chicago, etc., Ass'n *v.* People, 60 Ill. App., 488, 496.

"There is the less difficulty in reaching this construction and giving definite meaning to the jurisdiction of injunction, because of the very contrast between this writ and mandamus. The latter commands. The former forbids. Where there is nonfeasance mandamus compels duty. Where there is malfeasance, injunction restrains wrong. And so near are the objects of the two writs that there is sometimes doubt which is the proper one; injunction is frequently mandatory, and mandamus sometimes operates restraint. In these very motions it was argued on one side that the remedy of the State is by mandamus, on the other that it is by injunction. And it is very safe to assume that the constitution gives injunction to restrain excess, in the same class of cases as it gives mandamus to supply defect; the use of the one writ or the other in each case turning solely on the accident of over-action or shortcoming of the defendant. And it may be that where defect and excess meet in a single case, the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose."

* * * * * * *

"It was argued that courts of equity have no jurisdiction, at the suit of the attorney general, to enjoin usurpation, excess or abuse of corporate franchises. * * * We have had no difficulty in coming to the conclusion that courts of equity have such jurisdiction, and that it is a very beneficial jurisdiction,

almost essential to public order and welfare. It was hardly denied that the English court of chancery entertains jurisdiction in such cases; and indeed the English books leave little room for such denial. But it was said that in England the attorney general has a right to elect his forum, legal or equitable. * * * But it appears to us that this logically follows, everywhere, upon equitable jurisdiction to restrain corporate violations of charters or other public law. In such cases there is always a remedy at law. The attorney general may proceed at law by *quo warranto* to forfeit the charter of the offending corporation, and, if there be a penalty, as often happens, he may sue for it at law. And the concurrent remedy by injunction inevitably gives the election imputed to the attorney general. And we see no reason why the attorney general here has not the same election. To deny him such an election is only another way of denying the jurisdiction. The equitable jurisdiction precludes the objection that there is an adequate remedy at law. It admits the remedy at law, but administers its own remedy in preference, when the State seeks it in preference. It seems to proceed on the presumption that it may better serve the public interest to restrain a corporation, than to punish it by penal remedies, or to forfeit its charter; and that, in that view, the proper officers of the State should have an election of remedies."

Att'y Gen. *v.* Ry. Cos., 35 Wis., 425, 520, 523.

See also—

Craig *v.* People, 47 Ill., 487.

People *v.* 3d Ave. Ry. Co., 45 Barb., 63.

People *v.* Albany, etc., Ry. Co., 11 Abb. Pr., 136.

Buck Mt. Coal Co. *v.* Lehigh Coal, etc., Co., 50 Pa. St., 91.

Attorney General *v.* Patterson, etc., Ry. Co., 9 N. J. Eq., 526.

McNulty *v.* Brooklyn Heights Ry. Co., 66 N. Y. Supp., 57.

Volmer's Appeal, 115 Pa. St., 166.

Frederick *v.* Groshon, 30 Md., 436.

> "Courts of equity often compel corporations to act within the requirements of their charter where they attempt a departure which would be likely to cause irreparable mischief to any one."
>
> Story's Equity Jurisprudence, 11th ed., sec. 1558.

And the English courts of chancery prevent by injunction violations of charter obligations at the suit of the public.

Attorney General *v.* London, etc., Ry. Co. (1900), 1 Q. B., 78.

Attorney General *v.* Cockermouth Local Bd., L. R., 11 Eq., 172.

Ware *v.* Regents Canal Co., 3 De G. & J., 212.

Liverpool *v.* Chorley Water Works Co., 2 De G. M. & G., 852.

Attorney General *v.* Mid. Kent Ry. Co., L. R., 3 Ch., 100.

Nor can the objection that the injunction here requires a continuance of service at a pecuniary loss, and therefore that it is unreasonable and a taking of property without compensation, be properly made in this case, for it is found as a fact by the Territorial Supreme Court that not only did the evidence fail to show that this particular portion of the entire system was operated at a loss, but also that the evidence showed that the whole system was operated at a profit (Tr., p. 30). Therefore the appellant should not be permitted to reduce its service upon any one street so as to cause an inconvenience to the public. This court has sustained a requirement that an additional train be run to meet the obligation of furnishing proper service to the public, even though the running of that train taken alone would mean a loss, the reason being given in the following language:

> "This is so because as the primal duty of a carrier is to furnish adequate facilities for the public, that duty may well be compelled although by doing so

> as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of Smyth *v.* Ames (169 U. S., 526)."
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> Atlantic Coast Line *v.* No. Car. Corp. Com., 206 U. S., 1, 26.

And in the same case it is further said:

> "As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

It is therefore urged that even though there may be a remedy by mandamus to compel appellant here to perform certain duties laid upon it, yet the mere existence of such a remedy is not sufficient to warrant the conclusion that equity cannot interfere to prevent in advance a company from performing some act or making some change in its system which would clearly violate both its duty at common law as a carrier and its duty under its charter to maintain a sufficient car service to meet the public need and convenience. The facts disclosed here are so different from those involved in the numerous authorities cited by appellant as to make those authorities of little value in this case.

It is urged that no absolute rule, as is contended for by appellant, can be laid down, but that each case, of necessity, must be considered and determined on its merits.

Nor is the existence of a remedy at the suit of the Superintendent of Public Works for an annulment of the charter exclusive of the remedy invoked here. Some violations of charter obligations might warrant a forfeiture, but so harsh

a remedy would be granted with great reluctance, and should be sought only when clearly necessary. The facts of this case show that even an attempt to secure this relief would be unjust in the extreme. Nor would a forfeiture accomplish for the public the desired result, which is to secure adequate public service, not at all events, but only since this particular service can reasonably be sought in view of the condition and profitableness of the entire system of the company, and in view of the other facts showing that public convenience requires its continuation. The presence, therefore, in the franchise act of section 36 (Sec. 870, Revised Laws of Hawaii) authorizing the Superintendent of Public Works, with the consent of the Governor, to initiate proceedings for the forfeiture of the franchise should not be regarded as exclusive of any other proper remedy for the violation of some duty, but as merely a reservation of power to secure a forfeiture and a placing of that power in the hands of certain officials.

By section 2009 of the Revised Laws of Hawaii it is provided that:

> "Whenever it shall be necessary or desirable for the Territory in order to * * * enforce any other right * * * to institute judicial proceedings, it shall, except as otherwise expressly provided by law, be competent for the attorney general to bring and maintain a suit or suits for any such purpose in any appropriate court or courts of the Territory. All such suits shall be entitled in the name of the Territory by the attorney general of the Territory, against the party or parties or thing sued as defendants or respondents, or as the case may be."

Therefore statutory authority exists for the institution of this proceeding if it can be shown that appellant here was threatening to violate a duty owed to the public, that is, to the Territory representing the public as a party to the franchise contract.

It was found as a fact by the Territorial courts, both by the circuit judge who tried the case and by the Supreme

Court, that public convenience required a continuation of the existing ten-minute car service on this street (Tr., pp. 13, 25, and 29). At the solicitation of appellant, which contended that such a finding was not a pure finding of fact, the Supreme Court went further and stated the evidential facts upon which were based the ultimate fact as to public convenience (Tr., p. 30). From these evidential facts it is certainly clear that not only would a change in the schedule work to the great inconvenience of the traveling public, but that it would also work in some individual instances injury and pecuniary loss. The duty owed the public is therefore demonstrated, and it remains to consider the question of construction involved.

II. *Under the franchise appellant owed a specific duty to the public, enforceable through the courts.*

Summarized the argument of appellant is that by section 7 of the franchise (Sec. 811, R. L.), no duty is imposed upon it in so far as operating cars is concerned. This section reads as follows:

> "The said association and others shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require, and such other cars designed for the carriage of mails, parcels, and goods as they may deem necessary."

As we understand, appellant's contention now is that this section, in effect, is only a direction that enough cars must be kept on hand so that there will be sufficient at any one time to meet what the directors of the company may decide public convenience requires. This argument is very cleverly worked out by a careful analysis of the language, and by substituting synonyms for several words, and an effort is made to strengthen it by citing other provisions of the act—*i. e.*, Subdivision 4, of Section 9 (Subd. 4, of Sec.

843, R. L.), authorizing the company to make reasonable rules and regulations respecting the operation and maintenance of the road with the consent and approval of the governor.

Plausible though this argument is, yet it is urged that the construction so given is forced, and technical; that if carried to its logical conclusion, it would oust the courts from all jurisdiction over the many questions which are bound to arise over the matter of reasonableness, thus leaving the rights both of a private individual and of the public as a body solely within the uncontrolled discretion of the company and an executive officer.

It is urged that not only is the construction given by the Territorial courts to the section quoted, sound, but that it is thoroughly consistent with the provisions as to executive control of regulations made by the company. In discussing this question the trial judge said (Tr., p. 13):

> "Respondent also urges that the statute does not prescribe any specific duty on its part to be performed. It will be observed, however, that the statute specifically and clearly directs that the respondent 'shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require.' It has already been pointed out that the evidence clearly and conclusively shows that this requirement can only be complied with by a continuance of the ten-minute schedule. This surely, if anything further is required, renders the statute specific and certain beyond question. It is a familiar rule that, that is certain, which is capable of being made certain. Hence, from either point of view, the statute is specific and certain and enforceable."

The Supreme Court of Hawaii also said:

> "The defendant's claim that its right to regulate the operations of its railway includes the right to determine for itself at what intervals its passenger cars shall be run is not tenable. The statute requires

that it shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require (meaning, as we understand the statute, that the defendants actually operate and not merely, as it suggests, keep the cars in condition for using them), although 'other cars designed for the carriage of mails, parcels and goods' may be such as the association 'may deem necessary' (Sec. 841, R. L.)" (Tr., p. 22).

Also—

"We do not sustain the defendant's contention that the suit is premature pending the result of its application to the Superintendent of Public Works for permission to change its switches to conform to the proposed 10-20 minute service. The statute (Section 843, R. L.) provides that the company 'shall make reasonable and just regulations, with the consent and approval of the governor, regarding the maintenance and operation of said railway on and through said streets,' and failing to do so, 'the Superintendent of Public Works, with the approval of the governor, may make them.' This does not appear to us to be a grant to the association or to the executive of discretionary power to determine how many cars shall be run and at what intervals. A separate section, 841, provides that the company 'shall at all times maintain a sufficient number of cars.' A grant either to the company or to the executive of such an important power as to determine how many cars are required for this purpose would naturally and properly be expressed or clearly implied. Its exercise would not call for any public hearing, but ordinarily would be *ex parte* on the company's showing. A matter so important to the public is subject to judicial inquiry and determination, unless, as is not the case here, shown in clear language to be entrusted to executive discretion or to the discretion of the corporation" (Tr., p. 24).

And again—

> "Public convenience requires, as shown by the evidence, and as would be clear in the nature of the thing, that the proposed diminution of service upon that street shall not be made. While it might be difficult to say in advance what number of cars would be sufficient, owing to the vagueness of the terms 'sufficient' and 'public convenience,' there is nothing uncertain concerning the actual inconvenience of a reduction of the Liliha street service or in the public convenience requiring its continuance in order to conform with the time schedule on the connecting lines in the city of Honolulu" (Tr., p. 25).

The above quotations have been given in order that the reasons leading the Hawaiian courts to the conclusion reached by them might appear in their own language. In other words, the local courts refused to accept the technical construction given these sections of the franchise by appellant which would limit them in meaning to such an extent as to give the public no redress through the courts for any act of the company's, but on the contrary gave these sections a broad and comprehensive construction which would permit the public, which granted this franchise, to come into court and require by appropriate means a performance of corporate duty.

This it is submitted was correct, and furthermore, it is urged that the construction placed upon this franchise by the local courts is entitled to great weight in this court.

Kawananakoa *v.* Polyblank, 205 U. S., 349.

Copper Queen Mining Co. *v.* Arizona, 206 U. S., 474.

Kealoha *v.* Castle, 210 U. S., 149, 153.

The franchise act is a territorial statute to the same extent as are the other acts of the legislature of the Republic of Hawaii, which were continued in force by Congress.

Kawananakoa *v.* Polyblank, 205 U. S., 349.

The approval of the President under the general provisions of Section 73 of the Act to Provide a Government for the Territory of Hawaii, approved April 30, 1900, 31 Stats. at Large, 141, was no more in legal effect than a prior general authorization would have been, and did not make this act the creation of Congress.

Miners' Bank *v.* Iowa, 12 How., 1.

The facts differ from those presented by the case of Murphy *v.* Utter, 186 U. S., 95, 103, where the entire act of the Territory was amended "so as to read as follows" and then set out fully, section by section.

Therefore, here is presented a case where a local statute has been construed by a local court, and such construction must be obviously and unmistakably wrong before this court will overrule it.

It is, therefore, respectfully submitted that the judgment of the lower court should be affirmed.

C. R. Hemenway,
Attorney General of Hawaii, for Appellee.

Washington, D. C., *November* 4, 1908.

HONOLULU RAPID TRANSIT & LAND COMPANY *v.* TERRITORY OF HAWAII, BY HEMENWAY, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 412. Argued October 12, 1908.—Decided November 30, 1908.

The business of a transportation company operating under a franchise is not purely private, but is so affected by public interest that it is subject, within constitutional limits, to the governmental power of regulation.

The power to regulate the operation of railroads includes regulation of the schedule for running trains; such power is legislative in character, and the legislature itself may exercise it or may delegate its execution in detail to an administrative body, and where the legislature has so delegated such regulation the power of regulation cannot be exercised by the courts.

The boundaries between the legislative and judicial fields should be carefully observed.

By §§ 833–871 of chap. 66 of the Rev. Laws of Hawaii, the legislature having vested the regulation of the railway company thereby incorporated in certain administrative officers, it is beyond the power of the courts to independently regulate the schedule of running cars by decree in a suit; and so held without deciding as to the power of the courts to review the action of the administrative officers charged by the legislature with establishing regulations.

18 Hawaii, 553, reversed.

THE facts are stated in the opinion.

Mr. David L. Withington, with whom *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. W. R. Castle* and *Mr. A. Perry* were on the brief, for appellant:

Equity has no jurisdiction. Mandamus and not injunction is the remedy to enforce a statutory obligation. *Walkley* v. *City of Muscatine*, 6 Wall. 481; *Supervisors* v. *Rogers*, 7 Wall. 175; *Rees* v. *City of Watertown*, 19 Wall. 107; *People* v. *Albany & Vermont R. Co.*, 24 N. Y. 261; *Shackley* v. *Eastern R. R. Co.*,

98 Massachusetts, 93; *Moundsville* v. *Ohio River R. R. Co.*, 37 W. Va. 92. *In re Lennon*, 166 U. S. 556, and *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, discussed and distinguished.

That a railway company may be compelled by mandamus to perform its public duties specifically and plainly imposed by the franchise, and even to operate its road, has been held so many times that it seems to be unnecessary to cite further cases. *State* v. *Dodge City Ry. Co.*, 53 Kansas, 329; *S. C.*, 24 L. R. A. 564, and note; *State* v. *Bridgeton Co.*, 62 N. J. L. 592; *S. C.*, 45 L. R. A. 837, and note; *State* v. *Hartford & N. H. R. R. Co.*, 29 Connecticut, 583; *State* v. *Helena Power & Light Co.*, 22 Montana, 391; *San Antonio Street Ry.* v. *State*, 90 Texas, 520.

There is no ground for equitable relief. Whether a mandatory injunction can be obtained in Hawaii or not, equity will not interfere with the management of corporations or grant injunctions, except in clear cases and as a preventive measure against action which is likely to cause irreparable injury. *Brown* v. *Carter*, 15 Hawaii, 333, 350; *Wundenberg* v. *Markham*, 14 Hawaii, 167.

This action seeks to enforce a public right by the aid of an injunction, which is only done in a proper case for specific performance within the rules of equitable cognizance. The remedy is by mandamus, if the duty is specific; by *quo warranto*, if not. *Waianae Co.* v. *Bell Telephone Co.*, 6 Hawaii, 589.

An injunction does not lie to enforce a contract requiring continuous acts. 6 Pomeroy's Equity, 76.

The remedy in such a case is by mandamus or by proceedings in the name of the State for a forfeiture of the charter. A bill in chancery will not lie to enforce the specific performance of duties requiring continuous personal labor and care. *McCann* v. *South Nashville Ry.*, 2 Tenn. Chan. 773; *Marble* v. *Ripley*, 10 Wall. 358. And see *Northern Pacific R. R. Co.* v. *Dustin*, 142 U. S. 492, where the following cases are cited: *A., T. & S. F. R. R. Co.* v. *Denver & N. O. R. R. Co.*, 110

U. S. 667, 681, 682; *People* v. *N. Y., L. E. & W. Ry. Co.*, 104 N. Y. 58; *Commonwealth* v. *Eastern Ry. Co.*, 103 Massachusetts, 254; *Commonwealth* v. *Fitchburg R. R. Co.*, 12 Gray, 180; *Ohio & Miss. Ry. Co.* v. *People*, 120 Illinois, 200; *S. C.*, 11 N. E. Rep. 347; *Nashville, C. & St. L. Ry. Co.* v. *State*, 137 Alabama, 443; *Page* v. *L. & N. R. R. Co.*, 129 Alabama, 237; *State* v. *Helena Power & Light Co.*, 22 Montana, 391; *Mount Pleasant Cemetery Co.* v. *Patterson &c. Ry. Co.*, 43 N. J. L. 505; *Florida Ry. Co.* v. *State*, 31 Florida, 452; *State* v. *Kansas City Ry. Co.*, 51 La. Ann. 209; *Jones* v. *Newport News & M. V. Co.*, 65 Fed. Rep. 736; *San Antonio Street Ry. Co.* v. *State*, 90 Texas, 525; *People* v. *Long Island Ry. Co.*, 39 Hun (N. Y.), 125; *Minnesota* v. *Southern Minnesota R. R. Co.*, 18 Minnesota, 40; *People* v. *Brooklyn Heights R. Co.*, 172 N. Y. 95; *S. C.*, 64 N. E. Rep. 788, and cases there cited.

Under § 36 of the franchise the Superintendent of Public Works, with the consent of the Governor, is alone authorized to institute proceedings.

This is a special remedy provided in a special act, comprehensive in its nature, to be set in motion by the officers specifically charged with duties in connection with this corporation and the exercise of this franchise. *Bond* v. *Merchants' Tel. Co.*, 5 Quebec Super. 445; *State* v. *Manchester Ry. Co.*, 62 N. H. 29; *State* v. *Mobile & Montgomery Ry. Co.*, 59 Alabama, 321; *Anonymous*, 2 Ld. Raymond, 989; *Antoni* v. *Greenhow*, 107 U. S. 769.

Section 7 imposes no such specific duty to run the cars on any particular schedule as can be enforced by either mandamus or injunction.

The franchise reserves the power of controlling the discretion of the appellant in regard to regulations concerning the operation of the railroad to the Governor.

Mr. Charles R. Hemenway, Attorney General of the Territory of Hawaii, for appellee, submitted:

The equitable jurisdiction of the courts was properly in-

voked in this case. The fundamental difference between the remedies of injunction and mandamus is overlooked by appellant. In view of the facts alleged in the bill, and proved upon the hearing in this case, injunction was the proper remedy to seek in behalf of the public, and its relief was properly granted by the courts. The facts found show clearly the reasons for the granting of this relief, and show, too, a case proper for the intervention of equity.

Furthermore, when a corporation is acting or threatening to act in excess of its corporate power, or is misusing the franchise it possesses, to the injury of others, an injunction to restrain it is the proper remedy. *Grey, Attorney General,* v. *Greenville &c. Ry. Co.*, 60 N. J. Eq. 153, 158; *Chicago &c. Assn.* v. *People*, 60 Ill. App. 488, 496; *Attorney General* v. *Railway Cos.*, 35 Wisconsin, 425, 520, 523. See also *Craig* v. *People*, 47 Illinois, 487; *People* v. *Third Avenue Ry. Co.*, 45 Barb. 63; *People* v. *Albany Ry. Co.*, 11 Abb. Pr. 136; *Buck Mtn. Coal Co.* v. *Lehigh Coal Co.*, 50 Pa. St. 91; *Attorney General* v. *Patterson Ry. Co.*, 9 N. J. Eq. 526; *McNulty* v. *Brooklyn Heights Ry. Co.*, 66 N. Y. Supp. 57; *Volmer's Appeal*, 115 Pa. St. 166; *Frederick* v. *Groshon*, 30 Maryland, 436.

The English courts of chancery prevent by injunction violations of charter obligations at the suit of the public. *Attorney General* v. *London Ry. Co.* (1900), 1 Q. B. 78; *Attorney General* v. *Cockermouth Local Bd.*, L. R. 11 Eq. 172; *Ware* v. *Regents Canal Co.*, 3 De G. & J. 212; *Liverpool* v. *Chorley Waterworks Co.*, 2 De G., M. & G. 852; *Attorney General* v. *Mid. Kent Ry. Co.*, L. R. 3 Ch. 100.

Therefore, even though there may be a remedy by mandamus to compel appellant here to perform certain duties laid upon it, yet the mere existence of such a remedy is not sufficient to warrant the conclusion that equity cannot interfere to prevent in advance a company from performing some act or making some change in its system which would clearly violate both its duty at common law as a carrier and its duty under its charter to maintain a sufficient car service to meet